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In The

Supreme Court of the United States

October Term, 1994

JACK KEVORKIAN, *Petitioner,*

v.

STATE OF MICHIGAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

VOLUME II

Appendices B-E: Opinions of Michigan Court of Appeals & Circuit Courts

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VOLUME II

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Dated May 10, 1994)

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

Before: Fitzgerald, P.J., and Taylor and D. E. Shelton,* JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

FITZGERALD, J.

In these consolidated appeals, we are asked to determine the constitutionality of 1992 PA 270, as amended by 1993 PA 3,[1] MCL 752.1021 et seq.; MSA 28.547(121) *et seq.* Specifically, in docket number 164963, defendant appeals as of right the May 24, 1993, order of Wayne Circuit Judge Cynthia D. Stephens, which declared unconstitutional the criminal provision of the act for violating Const 1963, art 4, § 24 and dismissed the charges against Dr. Kevorkian. Judge Stephens also held that individuals have a constitutional right to commit suicide. In docket number 171056, plaintiff appeals as of right the December 13 and 14, 1993, orders of Wayne Circuit Judge Richard C. Kaufman, which held that a ban on assisted suicide is overbroad because, in some instances, a person has a constitutional right to commit suicide. Finding that Donald O'Keefe had a constitutional right to commit suicide, Judge Kaufman dismissed the charges against Dr. Kevorkian. Judge Kaufman also held that the act did not violate art 4, § 24. In docket number 172399, plaintiff appeals as of right the January 28, 1994, order of Oakland Circuit Judge Jessica Cooper, who also declared unconstitutional the criminal provisions of the act for violating art 4, § 24.

Teresa Hobbins is a terminally ill person who, along with seven health care professionals and another terminally ill person[2] sought a declarator judgment that 1992 PA 270, as amended by 1993 PA 3, MCL 752.1027; MSA 28.547(127), is unconstitutional. Dr. Kevorkian is a physi-

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[1] Aside from reorganizing the language in the title and making minor amendments to the language contained in section 7, 1993 PA 3 did little more than give immediate effect to 1992 PA 270.

[2] The health care professionals were dismissed by the trial court for lack of standing, and the remaining plaintiffs are not parties to this appeal.

cian who has been charged with assisting a suicide in violation of MCL 752.1027; MSA 28.547(127).

Ms. Hobbins and Dr. Kevorkian first contend that 1992 PA 270, as amended by 1993 PA 3, is unconstitutional for violating Const 1963, art 4, § 24, which states that, "No law shall embrace more than one object, which shall be expressed in its title." The question presented is governed by a de novo standard of review. *Mooahesh* v *Dep't of Treasury*, 195 Mich App 551, 562; 492 NW2d 246 (1992).

The object of a law is the aim or general purpose of the enactment. *City of Livonia* v *Dep't of Social Services*, 423 Mich 466, 497; 378 NW2d 402 (1985). While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one object. *Kent Co ex rel Bd of Supervisors* v *Reed*, 243 Mich 120, 122; 219 NW 656 (1928).

The purpose of the one-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection. *Mooahesh*, *supra* at 564. An act may contain all matters germane to its object, *Reed*, *supra*, and any provisions which directly relate to, carry out, and implement the principal object. *City of Livonia*, *supra* at 499. Legislation, if it has a primary object, is not invalid because it embraces more than one means of attaining its primary object. *Local No. 1644, AFSC&ME, AFL-CIO* v *Oakwood Hosp Corp*, 367 Mich 79, 91; 116 NW2d 314 (1962).

The one-object provision is to be construed reasonably and not in so narrow or technical a manner as to frustrate the legislative intent. *Kuhn* v *Dep't of Treasury*, 384 Mich 378, 387-388; 183 NW2d 796 (1971). However, the Supreme Court has not hesitated to hold void legis-

lation enacted to evade the procedural requirements which the Constitution places on legislation. *United States Gypsum* v *Dep't of Revenue*, 363 Mich 548, 554; 110 NW2d 698 (1961).

1992 PA 270 is entitled:

> AN ACT to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying; to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties; and to repeal certain parts of this act on a specific date.

Section 1 of the act provides:

> The legislature finds that the voluntary self-termination of human life, with or without assistance, raises serious ethical and public health questions in the state. To study this problem and to develop recommendations for legislation, the Michigan commission on death and dying is created.

Sections 2 through 6 of the act establish the membership of the commission and define its role and duties.

Section 7 of the act creates a new crime of "criminal assistance to suicide," which makes it a felony to:

> (a) Provide[s] the physical means by which the other person attempts or commits suicide.
>
> (b) Participate[s] in a physical act by which the other person attempts or commits suicide.

1992 PA 270 had its origin in House Bill 4501. Examination of both the title and content of HB 4501 at various states of legislative process is necessary to aid in the

inquiry of whether 1992 PA 270 contains more than one object.

As first introduced on March 7, 1991, the sole purpose of HB 4501 was to create a new public act to establish a commission to study certain issues related to death and dying. House Bill 4501 was entitled:

> AN ACT to create the Michigan Commission on Death and Dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying.

At the time HB 4501 was introduced, Senate Bill 32 and House Bill 4038 were pending before the Judiciary Committee. The bills were devoted to amending the Michigan Penal Code to "prohibit a person from causing, providing the means of, or acting as a participant in a suicide or attempted suicide."

On November 12, 1992, the House Judiciary Committee approved HB 4501. The title and provisions of HB 4501 were amended after the second reading on November 24, 1992, the day after Dr. Kevorkian provided assistance to another suicide, to include criminal proscriptions similar to those contained in SB 32. The amended version of HB 4501 became 1992 PA 270.

The original purpose of HB 4501, as expressed in both the title and body of the bill, was to create a new public act to study certain issues related to death and dying. This bill had no regulatory authority. When HB 4501 was amended to add the substance of SB 32, the additional provisions had another and different objective — to amend the penal code to create the crime of criminal assistance to suicide.

The Attorney General posits both objectives are within the acts primary purpose of regulating assisted

suicide. However, neither the original title of HB 4501 nor the title of 1992 PA 270 as enacted declare such a purpose.[3] A fair reading of 1992 PA 270 reveals that, although encompassing a single "subject,"[4] the legislation has not one, but rather two, primary objectives. These objectives were originally the subjects of two distinct bills. One bill (HB 4501) encompassed the study of issues related to voluntary self-termination of life, *with or without assistance*, and another (SB 32) only encompassed the crime of criminal assistance to suicide. The suggestion that the amendment of HB 4501 to include the substantive provisions of SB 32 resulted in one primary purpose of "regulating assisted suicide" is unpersuasive in the absence of a comprehensive declaration of such a purpose in the title of the act. *People* v *Milton*, 393 Mich 246-247; 224 NW2d 266 (1974).

Had the Legislature intended to codify or regulate the general "subject" of assisted suicide,[5] it could have notified the public of this intention by declaring a single broad purpose and by joining the object contained in HB 4501 with the object contained in SB 32 together in one bill. This the Legislature did not do. This failure resulted in the body of the act containing two distinct objects. The fact that the title was amended to reflect the addition of section 7 does not cure the constitu-

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[3] If the primary purpose of HB 4501 was to regulate assisted suicide, it would have been unnecessary for the Legislature to amend the title of HB 4501 because a title need not be an index of an act's provisions. *Builder's Square*, *infra* n 4 at 498.

[4] The one-object provision may not be circumvented by enacting a law that involves a single subject but is designed to accomplish different objectives. *Advisory Opinion*, *supra* at 129-130.

[5] See, e.g., *Builders Square* v *Dep't of Agriculture*, 176 Mich App 494; 440 NW2d 639 (1989) (a case on which the Oakland County prosecutor relies) and numerous other codified areas of the law, e.g., the drain code and the insurance code.

tional infirmity. The one-object provision may not be circumvented by creating a title that includes different legislative objects. *Hildebrand* v *Revco*, 137 Mich App 1, 11; 357 NW2d 778 (1984). We find, therefore, that 1992 PA 270 as enacted has two distinct objects which, although encompassing the same "subject," are not germane to each other, are directed toward different purposes and, when grouped together in one act, offend the constitutional one-object provision.[6] In reaching this conclusion, we recall the Supreme Court's pronouncement in *Advisory Opinion on Constitutionality of 1975 PA 227 (Question One)*, 396 Mich 123, 133; 240 NW2d 193 (1976):

> This Court is mindful of the worthy purpose and high motivation of the Legislature and the proponents of the subject Act. It also is mindful of the basic dictates of the Constitution of this state. Our test cannot be one of policy but one of constitutionality. On that test, the Act must fall.

The Oakland County prosecutor relies on *People* v *Trupiano*, 97 Mich App 416; 296 NW2d 49 (1980). *In Trupiano*, provisions of Michigan's Public Health Code created departments charged with enforcing the code and included a provision to prescribe criminal penalties for possession of controlled substances, survived a constitutional challenge based on a violation of the one-object doctrine.

Trupiano is distinguishable from the instant case. *Trupiano* involved a legislative enactment that constituted a "code." As noted by the Court in *Trupiano*:

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6 To buttress our conclusion, though certainly not controlling, we have in this case the opinion from the counsel for the House Judiciary Committee that the amendment of HB 4501 would violate the one-object provision of art 4, § 24. Similarly, in analyzing HB 4501 as enrolled, the House Legislative Service Bureau opined that the bill is subject to a constitutional challenge based on art 4, § 24.

The Supreme Court has recognized a wide degree of discretion in reviewing legislative enactments which constitute a "code." In *Advisory Opinion re Constitutionality of 1972 PA 294, supra*, the Court noted at 463:

> "Emphasis is given to the fact that the subject matter constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law. If we fail to permit such a design codes may not be enacted in Michigan so long as the 'one-object' limitation is present in the constitution."

Thus, codes that have a general purpose or aim that is implemented through a number of specific statutory provisions have survived challenges based on a violation of the one-object clause because if too strict a reading is given article 4, section 24, no codes enacted in Michigan would be constitutional. See *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 463; 208 NW2d 469 (1973). The act in this case is not a codification, and as previously noted, the attempt to define the object broadly to encompass all subjects related to the issue of assisted suicide is unpersuasive.

1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of Const 1963, art 4, § 24 and is, therefore, unconstitutional. In light of this conclusion, we need not address the remainder of the constitutional challenges to the act However, in anticipation of Supreme Court review, and in the interest of judicial economy, we will briefly address Ms. Hobbins' argument that Michigan's assisted suicide statute deprives its citizens of a constitutional right protected by the Due Process Clause of the Fourteenth Amendment.

In *Roe* v *Wade*, 410 US 113; 93 S Ct 704; 35 LEd 2d 147 (1973), the United States Supreme Court posited the existence of a "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 US at 153. The Court, however, expressly stated that this "privacy right . . . cannot be said to be absolute[,]" and noted that it has consistently "refused to recognize an unlimited right of this kind in the past" *Id.* at 154. Essential to the analysis in the case at bar is the Supreme Court's recognition and affirmation of the State's compelling interest in protecting life: "[T]he State's important and legitimate interest . . . in protecting fetal life after viability [justifies legislation that] may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164. Furthermore, "a State [has] an unqualified interest in the preservation of human life . . . ." *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261, 282; 110 S Ct 2841; 111 L Ed 2d 224 (1990). The constitutionality of legislative enactments to protect life is clearly established in our law.[7]

When individuals assert constitutional rights against state regulation, whether encompassed by the "zones of privacy" recognized in *Roe* or acknowledged as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, a court must balance the individual interest against the state's interest *Cruzan*, 497 US at 279; *Roe*, 410 US at 154. It is, of course, necessary that the asserted right be one that is accorded constitu-

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[7] The legitimate state interest in protecting life recently was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___, ___, ___, ___, ___; 112 S Ct 2791; 120 LEd 2d 674, 710, 738, 773, 783 (1992).

tional protection under our law. Such is not the case in the instant matter.

Determination of the existence of "rights not readily identifiable in the Constitution's text" sometimes, as in the opinions under review here, seems merely "the imposition of the [judges'] own choice of values . . . ." Attempting "to identify the nature of the rights qualifying for heightened judicial protection[,]" the Supreme Court has ruled "that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' [Alternatively,] they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers* v *Hardwick*, 478 US 186, 191-192; 106 S Ct 2841; 92 LEd 2d 140 (1986) (citations omitted). The "right" asserted by Ms. Hobbins — the right to commit suicide — satisfies neither definition.

The scope of rights encompassed by the concept of ordered liberty does not include the right to commit suicide, much less the right to assisted suicide. The "guarantee of personal privacy" has been "exten[ded] to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Roe*, 410 US at 152-153. (citations omitted). Judicial discovery of a right to terminate one's life is not a logical extension of this catalog of rights.[8] Liberty and justice will not cease to exist if a right to commit suicide is not recognized.

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[8] Even in these areas, the Supreme Court has not found that all rights are implicit in the concept of ordered liberty. For example, the Court has expressly rejected the contention that a right to consensual sodomy is implicit in the concept of ordered liberty, or that an unwed father's liberty interest was violated by a statute's presumption that the husband of the child's mother is the child's father and which denied him any right to visitation. *Bowers*, *supra*; *Michael H* v *Gerald D*, 491 US 110; 109 S Ct 2333; 105 LEd 2d 91 (1989)).

Plaintiffs argue that the liberty interest[9] recognized in *Cruzan* supports the broader concept of a right to self-determination, which necessarily encompasses the right asserted here. However, plaintiffs misapprehend the true nature of the right recognized in *Cruzan*.

The Supreme Court began its discussion of the issue before it by noting the common law basis of "the right of a competent individual to refuse medical treatment [and stating] that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ." The Court noted: "This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" The Court then made clear its intention to "follow the judicious counsel . . . 'not to attempt, by any general statement, to cover every possible phase of the subject.'" *Cruzan*, 497 US at 277-278. (citation omitted). The right recognized in *Cruzan* was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death. Furthermore, even this limited right is not absolute: "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281. The right asserted by plaintiffs is not a fundamental liberty; liberty and justice will not cease to exist as a result of this Court's decision not to accord it constitutional status.

Neither is the right to commit suicide deeply rooted in this nation's traditions. At common law, a suicide

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9 The *Cruzan* court noted that "many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy," [see, e.g., *In re Quinlan*, 70 NJ 10; 355 A 2d 647 (1976)] but expressed its belief that "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan*, 497 at 279 n 7 (citation omitted).

incurred criminal liability and harsh penalties. "Although the States abolished the penalties . . . , they did so to spare the innocent family and not to legitimize the act" *Id.* at 294 (Scalia, J., concurring). Furthermore, "[c]ase law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. . . . And most states that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful." *Id.* (citation omitted). There is, therefore, no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history.

There is a "rationalizing principle" that justifies the inclusion of non-textual rights on the list of protected rights that designates them as "implicit in the concept of ordered liberty." Faced with an individual rights challenge to a legislative enactment, the courts must answer this question: "Does [the statute] violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" *Palko* v *Connecticut*, 302 US 319, 325, 328; 58 S Ct 149; 82 LEd 288 (1937) (citation omitted). As to an alleged right to commit suicide, the answer is clearly no. We therefore decline to find such a right.

The wisdom of judicial circumspection in discovering new constitutional rights has been cogently expressed by Justice Byron White:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having

> little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority. [*Moore* v *East Cleveland*, 431 US 494, 544; 97 S Ct 1932; 52 LEd 2d 531 (White, J, dissenting).]

The orders in docket numbers 164963, 171056, and 172399 dismissing the charges of providing assistance to suicide are affirmed.[10] Judge Stephens' order in docket number 164963 and Judge Kaufman's order in docket number 171056 are reversed with respect to their holdings regarding a constitutional right to commit suicide. Judge Kaufman's order in docket number 171056 is also reversed with respect to the holding that the statute does not violate the title-object provision.

/s/ E. Thomas Fitzgerald

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[10] Judge Kaufman reached the correct result in dismissing the case, albeit for the wrong reason.

OPINION CONCURRING IN PART AND DISSENTING IN PART

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

SHELTON, J. (concurring in part and dissenting in part).

I concur in the opinion of Judge Fitzgerald that 1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of our State Constitution. I therefore concur in affirming each of these three cases. I dissent from that portion of the opinion which dismisses the claims under the due process clause of the United States Constitution and write separately to address that issue.

It is the seminal claim of Ms. Hobbins and the other terminally ill plaintiffs, as well as Dr. Kevorkian and the original physician plaintiffs in *Hobbins*, that a suffering, terminally ill person has a constitutional right to control his or her own body to end his or her suffering by death and with the assistance of a physician. The constitutional claim is derived from the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law." For over one hundred years, the Supreme Court has held that this clause includes substantive as well as procedural rights. See *Mugler* v

Kansas, 123 US 623; 8 S Ct 273; 31 LEd 205 (1887); *Poe* v *Ulman*, 367 US 497; 81 S Ct 1752; 6 LEd 2d 989 (1961); *Daniels* v *Williams*, 474 US 327; 106 S Ct 662; 88 LEd 2d 662 (1986); *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___; 112 S Ct 2791; 120 LEd 2d 674 (1992). In this manner, the Constitution protects the fundamental rights of citizens which comprise their "liberty" against invasion by the State.

The scope of these substantive liberties is not limited to those provided by the Bill of Rights or to those rights recognized at the time the clause was enacted. Nor, as urged by appellants, can they be defined by some formula based upon prior "tradition and practices," although tradition is a factor. The Supreme Court recently addressed this concept in *Casey*, 112 S Ct at 2806:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
>
> > "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty

> and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds upon what has survived is likely to be sound. No formula could serve as a substitute, in this area for judgment and restraint." [Quoting *Poe, supra* at 542.]

If the determination of which liberties are included within the meaning of the "due process" were delimited by tradition alone, no expansion of liberties in the name of the Constitution would ever have been made in the last two centuries.[1]

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[1] **The conclusion that "the right to commit suicide" is not deeply rooted in this nation's traditions certainly is not therefore dispositive. More importantly, the statement that "[t]here is . . . no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history" is factually incorrect. Suicides by terminally ill persons have occurred throughout our history and indeed have often taken place with the quiet and unpublicized assistance of treating physicians and family members. The following was noted in *Care of the Hopelessly Ill*, by T. E. Quill, C. K. Cassel, and D.E. Meier, The New England Journal of Medicine (Nov. 5, 1992) 1380 at 1381:**

> **It is not known how widespread physician-assisted suicide currently is in the United States, or how frequently patients' requests are turned down by physicians. Approximately**

(*concluded on page A-127*)

Our judicial history has of course been to the contrary and we must initially look for guidance to the panoply of rights which the Supreme Court has previously defined as individual "liberties" to determine if a personal right to end suffering by hastening one's own death is rationally within the scope of that constitutional protection. I conclude that it is.

Most of the Supreme Court decisions which describe the compass of an individual's right to "liberty" or freedom from government intrusion have involved personal and family decisions. These cases must be viewed as a developing "rational continuum," as described by Justice Harlan in *Poe*, *supra* at 543. Taken together, they demonstrate that the Supreme Court has found that the due process clause of our Constitution limits the power of the government to intrude into personal decisions involving the basic integrity of an individual's body or family. Justice O'Connor spoke for the Court in *Casey*, *supra* at 2807, and described the essence of the cases defining "liberty":

(*continued from page A-126*)

> **6000 deaths per day in the United States are said to be in some way planned or indirectly assisted, probably through the "double effect" of pain-relieving medications that may at the same time hasten death or the discontinuation of or failure to start potentially life-prolonging treatments. From 3 to 37 percent of physicians responding to anonymous surveys reported secretly taking active steps to hasten a patient's death, but these survey data were flawed by low response rates and poor design. Every public opinion survey taken over the past 40 years has shown support by a majority of Americans for the idea of physician-assisted death for the terminally ill.**

Additionally, the issue here is not whether a healthy person should be granted an unrestricted "right to commit suicide" but rather the ability of a suffering terminally ill patient to decide to end that suffering with death and to have a doctor assist in implementing that decision.

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey* v *Population Services International*, 431 US, at 685, 52 LEd 2d 675, 97 S Ct 2010. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v *Baird*, [405 US] at 453, 31 LEd 2d 349, 92 S Ct 1029 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince* v *Massachusetts*, 321 US 158, 166, 88 LEd 645, 64 S Ct 438 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.* Beliefs about these matters could not define the attributes of personhood where they formed under compulsion of the State. [Emphasis added.]

In *Casey*, the Court reaffirmed its decision in *Roe* v *Wade*, 410 US 113; 93 S Ct 705; 35 LEd 2d 147 (1973), that a woman has the liberty to decide whether to have an abortion prior to the viability of the fetus. The Court in *Roe* described this realm of protected personal liberties as the "right of privacy." In *Cruzan* v *Director, Missouri Department of Health*, 497 US 261; 110 S Ct 2841; 111 LEd 2d 224 (1990), the Supreme Court addressed the issue that had been posed earlier in *In re Quinlan*, 70 NJ 10; 355 A2d 647 (1976). In *Quinlan*, the Court found that a severely brain damaged woman had a right of privacy,

protected by the federal constitution, which included her right to terminate the use of equipment that was prolonging her existence. In *Cruzan*, the Supreme Court affirmed the principal of *Quinlan* that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" even if that refusal will result in that person's death. The Court found that even "the refusal of artificially delivered food and water is encompassed within that liberty interest." As Chief Justice Rehnquist put it, "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality." *Cruzan, supra* at 281.[2]

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[2] The *Cruzan* decision followed a number of state court decisions in addition to *Quinlan*. Some of those opinions offer insights which are helpful. In *Bouvia* v *Superior Court*, 179 Cal App 3d 1127 at 1147, 225 Cal Rptr 297 at 307 (1986), Justice Compton in his concurring opinion stated:

> Elizabeth apparently has made a conscious and informed decision that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. The state and the medical profession instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane. The right to die is an integral part of our right to control our own destinies as long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others, including the medial profession, in making death as painless and quick as possible.

And in *McKay* v *Bergstedt*, 801 P2d 617, 624-626 (Nev 1990), the Nevada Supreme Court stated:

> At some point in the life of a competent adult patient, the present or prospective quality of life may be so dismal that the right of the individual to refuse treatment or elect discontinuance of artificial life support must prevail over the interest of the state in preserving life. In instances where the prospects for a life of quality are smothered by physical pain and suffering, only the sufferer can determine the value of continuing mortality . . . . The State's interest in the preservation of life relates to meaningful life.

Against this background, we are squarely presented with the question of whether the situation of an assisted suicide to a suffering terminally ill person is significantly different from the rights defined by the Supreme Court in those cases. To pose the questions makes the answer obvious. If a terminally ill person can lawfully end her life by disconnecting a life-sustaining machine (*Cruzan*), why cannot she end that same life by connecting a life-ending machine? If a healthy woman can lawfully terminate a healthy fetus (*Roe, Casey*), does not that same woman who is later terminally and painfully ill have a right to terminate her own life? Does the State have a right to totally prevent a terminally ill person from ending his or her life by charging the doctor who assists her with a four year felony, or even with murder?[3] If a doctor (or even a nurse or medical assistant) can lawfully end a patient's life by disconnecting a life-sustaining machine (*Cruzan*), why cannot a doctor do the same by connecting a life-ending machine? If a healthy woman has a right to have a doctor assist (and indeed can only use a doctor to assist) to lawfully terminate a healthy fetus (*Roe, Casey*), does not that same woman who is later terminally and painfully ill have a right to have a doctor assist to terminate her own life? If ending one's own life is a lawful act, how can the state punish a doctor who assists in that lawful conduct?

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3 In a separate opinion in *People* v *Kevorkian*, Docket No. 154740, Judges Fitzgerald and Taylor have held that Dr. Kevorkian may be charged with the crime of murder for assisting in a suicide prior to the enactment of the statute which is at issue in these cases. Although the majority has chosen to separate the opinions, these cases were consolidated because they all pose the same Constitutional issue. I have dissented from the opinion in No. 154740 primarily based upon the reasons set forth in my opinion in these cases. It seems self-evident that if the State may not constitutionally criminalize conduct with a four year felony, it clearly may not do so with a murder charge.

The federal district court in Washington very recently analyzed a similar assisted suicide statute in that State and similarly concluded that *Casey* and *Cruzan* require the courts to find a constitutionally protected liberty interest in the decision of a terminally ill person to hasten death. In *Compassion in Dying* v *Washington*, __ F Supp __ (Docket No. C94-119R, U.S.D.C., W.D. Wash, dec. May 3, 1994), Judge Rothstein held:

> Like the abortion decision, the decision of a terminally ill person to end his or her life "involv[es] the most intimate and personal choices a person may make in lifetime" and constitutes a "choice[] central to personal dignity and autonomy."

and:

> There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.

The majority opinion on this issue attempts to draw such a distinction from *Cruzan* on the basis that "the right recognized in *Cruzan* was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's own death." This is apparent acceptance of the State's suggestion that it is the active rather than passive nature of the assistance here which extinguishes the right of the suffering patient. Aside from serious questions of

whether starving Ms. Cruzan to death was "natural," the best reply to this suggestion is perhaps found in Justice Scalia's concurrence in *Cruzan*, *supra* at 296-297:

> Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. . . . It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing.
>
> * * *
>
> . . . Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to "pu[t] an end to his own existence." [Quoting 4 Blackstone, *Commentaries*, p 189.]

If the active-passive distinction has any meaning, it would not be in the situations presented here. The third person who turns off the life-supporting machine must perforce affirmatively do so. Here, the assistant places the means within the control of the patient and allows the patient to take the final active step.

On a far less legalistic basis, the honest intention of the assisting person in both instances is the same. When the medical person turned off the life supporting machinery to Karen Quinlan, that person intended and expected the patient to die just a surely as did Dr. Kevorkian when he showed his suffering patients how to

activate his lethal devices and placed the devices within their control. If anything, the intent is less onerous in these instances since, at least as compared to Ms. Quinlan and other incompetent patients, these patients made the final personal decision and took the final personal action for themselves.

It is also suggested by the State that it is the involvement of another person in assisting the death that makes the situation different Such a contention ignores the clear import of *Roe*, *Casey*, *Quinlan*, *Cruzan*, and all of the other due process cases involving medical procedures. A woman's right to have an abortion involves, by necessity and for safety, the assistance of another person. Similarly, it is obvious that neither Ms. Quinlan nor Ms. Cruzan were going to be able to terminate their life support equipment without the assistance of another person. Indeed the availability of that assistance was what those cases were, and what these cases are, ultimately about. Again, if anything, the situations here involve less immediate assistance because the patients personally activated the equipment which caused their death.

In the end, as far as the liberty interest of the patient is concerned, the truth is that there is simply no rational distinction between assisting the termination of life support to a suffering terminally ill patient and assisting the administration of life ending measures to a suffering terminally ill patient.

Aside from a review of the cases in which the Supreme Court has previously defined the rights and liberties protected by Constitutional due process, we must decide if the right to end personal pain and suffering is "implicit in the concept of ordered liberty." Liberty in the context of our Constitution means the freedom of an individual to determine matters about

him or her self for him or her self and not have others, even if they are in the majority and thus comprise the government, force their will upon the individual. The basic concept of self determination and personal autonomy is the central point of our Constitutional structure. In matters that relate solely to our selves, we alone are free to decide our personal fate and neither the mob nor the government may take that away from us. As the Supreme Court said over one hundred years ago in *Union Pacific Railway Co* v *Botsford*, 141 US 250; 11 S Ct 1000; 35 LEd 734 (1891):

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29.

In the context of these cases, the essence of self determination is the decision of whether to continue to endure insufferable pain. The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy. It is difficult to imagine a more personal choice than whether to continue life when faced with a terminal and excruciatingly painful condition. The poignant truth of Justice O'Connor's observation in *Casey*, *supra*, makes it worthy of repetition:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. [*Casey*, *supra* at 2807.]

The real issue in these cases is not whether there is some broad "right to commit suicide" but rather whether an individual, and not the government, has the right of choice between enduring pain and suffering or ending that suffering with death. Stated conversely, the issue is whether our government has the right to force us, against our will, to live out a life of pain and suffering when we have done no wrong to anyone else. I conclude, without hesitation, that our Constitution preserves and guarantees our right to make that decision for ourselves and that it forbids the government from taking that choice from us when we have done no wrong. There could be no more basic right in our ordered concept of liberty.

This conclusion, however, does not mean that the State may not regulate and control that choice. As the Court said in *Cruzan*, *supra* at 279:

> But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondents constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Youngberg* v *Romeo*, 457 U.S. 307, 321; 73 L Ed2d 28, 102 S Ct 2452 (1982).

Certainly where the state has a legitimate interest in such matters as the preservation of life and family, the Court has indicated that it may fetter individual choice in those areas with a variety of controls and impediments designed to insure that the choice is voluntarily and knowingly made and that it is implemented under safe and reasonable conditions. Indeed, in *Cruzan* the Court upheld Missouri's insistence upon a requirement of clear and convincing evidence to establish the patient's true intent And, in *Webster* v *Reproductive*

Health Services, 492 US 490; 109 S Ct 3040; 106 LEd 2d 410 (1989), as well as *Casey*, *supra*, the Court clearly indicated that it would allow the states considerable latitude in controlling and regulating the choice of a woman to have an abortion.

The State of Michigan clearly has public interests in the decision of a suffering terminally ill patient to end that suffering with death. In addition to its generally recognized interest in the preservation of life, the State may legitimately be concerned, for example, that the patient be given ample opportunity for medical consultation about the nature and permanence of the underlying condition, that the patient has received available medical and psychiatric assistance, or that the procedure is performed under proper medical conditions by an appropriate medical assistant. Indeed, this is an area of medical concern where the State clearly should be involved to insure the public welfare.

But the extent to which the state may fetter or control the patient's liberty to choose death is not before us. If the Michigan assisted suicide statute "has the purpose or effect of placing a substantial obstacle in the path" of the exercise of a constitutionally protected liberty interest, the statute violates due process. *Casey*, *supra* at 2820. In this statute, the State has chosen to do virtually the only thing which the Constitution does not allow: the absolute prohibition of the making of that personal choice by criminalizing it. The appellants assert that this is a permissible means of "regulating" a personal liberty interest because of the overwhelming interest of the state. The argument stems from what some have characterized as the "slippery slope" fear that anything less than a total prohibition of assisted suicide will eventually result in the uncontrolled and irresponsible taking of a multitude of lives in situations

far less compelling than the individuals involved in these cases. The argument is unsound. If a state can "regulate" such a personal choice by completely prohibiting it, there would be no meaningful choice in the first instance. As stated in *Compassion in Dying* v *Washington, supra:*

> But despite the general validity of the State's concern, the slippery slope argument cannot prevail in this instance. It may be difficult to define the kinds of assistance which are necessary and should be permitted in order to honor terminally ill patients' liberty interest in hastening their death. However, that is not a sufficient excuse for precluding *entirely* the exercise of a constitutional right. The court has no doubt that the legislature can devise regulations which will define the appropriate boundaries of physician-assisted suicide for terminally ill individuals, and at the same time give due recognition to the important public policy concerns regarding the prevention of suicide.

We need not speculate here about the extent to which the State may regulate the liberty involved here. We need only say, and should say, that the State may not completely outlaw it as this statute purports to do. This government may not totally take from us our inherent right to determine not only who we are but, even more essentially, whether we are.

/s/ Donald E. Shelton

OPINION CONCURRING IN PART AND DISSENTING IN PART

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

TAYLOR, J. (concurring in part; dissenting in part)

I join Judge Fitzgerald's substantive due process analysis without any reservations. However, I respectfully dissent from the majority's interpretation of the title-object clause, Const 1963, art 4, § 24. The Assistance to Suicide Act (the Act), 1992 PA 270, as amended by 1993 PA 3, MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.*, does not violate this constitutional provision.

At the outset, I would call attention to the well-established maxims of judicial review applicable in cases where constitutional challenges are brought against legislative enactments:

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. * * * Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt

> that it violates some provision of the Constitution that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt. [*Rohan* v *Detroit Racing Association*, 314 Mich 326, 341-342; 22 NW2d 433 (1946).]

Construing identical language over a century ago, our Supreme Court explained the purpose of the title-object clause as follows:

> The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require

> that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. [*People* v *Mahaney*, 13 Mich 481, 494-495 (1865).]

In finding the Act violative of art 4, § 24, the lower court opinions, as well as the majority here, emphasize that this clause is intended to prevent the combination in one bill of legislative goals or objects "having no necessary connection." The majority concludes that the Act contains two objects — study of possible legislative action concerning assisted suicide and the criminalization of assisted suicide — and that these objects have no necessary connection. This confuses the object of the Act with the means utilized to accomplish that object. It also gives a crabbed reading to the phrase "no necessary connection," depriving it of its intended meaning by taking it out of its context in the *Mahaney* case.

The majority argues that the statute has one subject, but two objects. That is, at best, to put too fine a point on things. Our Supreme Court has explained that "[t]he 'object' of a law is its general purpose or aim." *Livonia* v *Department of Social Services*, 423 Mich 466, 497; 378 NW2d 402 (1985). Furthermore,

> [t]o require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but would actually render legislation impossible. [*Id.*]

The majority would hold that if they can plausibly posit the existence of two "objects," then these "objects" have no necessary connection. This is contrary to the meaning of the phrase as used by the *Mahaney* court

More importantly, it confuses the means used to accomplish a general object with the object itself.

Our Supreme Court "has long and consistently said that art 4, § 24, and similar 'one object' provisions in earlier constitutions, are to be construed reasonably 'and not in so narrow and technical a sense as unnecessarily to embarrass legislation.'" *Kuhn* v *Department of Treasury*, 384 Mich 378, 387; 183 NW2d 796 (1971). The majority refuses to acknowledge the import of this holding, even though citing it approvingly, by immersing itself in irrelevant procedural minutiae that does not pertain to the title-object analysis. The general legislative intent as expressed in the Act is the only appropriate focus of a title-object inquiry. Simply stated, a court should endeavor to discern a unity of purpose and only when such cannot be found declare the Act invalid. To do otherwise is unnecessarily to embarrass legislation. The majority's position runs contrary to the appropriate deference to the Legislature that has characterized judicial review in this state. *Rohan*, *supra*.

In the case at bar, it is unquestionable, I believe, that the general purpose or object of the Act is to formulate an appropriate legislative response to the issue of assisted suicide. That there would be different provisions carrying forward this aim not only is proper but is altogether routine and expected when the Legislature does its work.

The provisional criminalization of assisted suicide, while the Commission on Death and Dying took testimony and made recommendations as to a long term solution, was intended to allow the issue to be addressed in an atmosphere conducive to calm deliberation. This method of assisting the commission is consistent with the object of the legislation. The Act, therefore, "is confined to the means supposed to be

important to the end indicated," *Mahaney*, *supra* at 496, and merely "authorize[s] the doing of all things which may fairly be regarded as in furtherance of the general object of the enactment" *Kent County* v *Reed*, 243 Mich 120, 123; 219 NW 656 (1928). The Act does not violate the title-object clause of art 4, § 24.[1]

Neither does the Act violate the change of purpose clause of art 4, § 24.[2] The clause states:

> No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

A related provision (the "five-day rule"), found in art 4, § 26, states:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days.

In *Anderson* v *Oakland County Clerk*, 419 Mich 313; 353 NW2d 448 (1984), our Supreme Court, discussing the change of purpose clause and the five-day rule, stated:

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1 Although acknowledged as "certainly not controlling," the majority cites the opinions of counsel for the House Judiciary Committee and the House Legislative Services Bureau that the Act violates the title-object clause. The majority feels that such opinions buttress their conclusion that the Act is unconstitutional. To so hold requires that one assume that upon reading and considering the advice from their staff the members of the Legislature decided to act in violation of their oaths to comply with the constitution. This is an impermissible assumption. Rather, the assumption should be that, expressly alerted to a constitutional issue, they considered it and found that acting in the way they did was constitutional *Marbury* v *Madison*, 5 U.S. (1 Cranch) 137 at 179-180 (1803).

2 Though not discussed in the majority opinion, I briefly discuss the issue of the change of purpose clause because it was decided in the three lower court opinions under review.

> These are not recent provisions. A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit.
>
> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule. [*Anderson* at 329-330 (footnotes omitted).]

The opponents of the statute assert that inclusion of the temporary criminalization provision violated the change of purpose clause. However, as I have earlier indicated, there was only one purpose served by all provisions, and thus there is no violation of the change of purpose clause of art 4, § 24.

Furthermore, even if 1992 PA 270 violated the change of purpose clause, the entire Act was amended and reenacted as 1993 PA 3. An amendatory act by its nature supersedes its predecessor and replaces it. *Lahti* v *Fosterling*, 357 Mich 578, 587-588; 99 NW2d 490 (1959). Because 1993 PA 3 has at all times included both the criminalization and study commission provisions, and because 1993 PA 3 is the only relevant act, the change of purpose clause was not violated.

As to the five-day rule, the legislative history of the Act, recounted in the majority opinion, shows that the criminalization provision, in what became 1992 PA 270, was added on November 24, 1992, more than five days before passage on December 3, 1992. Therefore, I would

hold that 1992 PA 270 complied with the requirements of the five-day rule. The Senate bill that became 1993 PA 3 was introduced on January 26, 1993, at which time it contained the study provisions and the temporary criminalization provision. It was enacted on February 25, 1993. Accordingly, I would hold that 1993 PA 3 also complied with the five-day rule.

As noted at the outset, I concur with Judge Fitzgerald's substantive due process analysis. However, I dissent with respect to art 4, § 24. I would reverse on that basis in docket nos. 164963 and 172399, and would affirm the analysis of art 4, § 24 in docket no. 171056.

/s/ Clifford W. Taylor

APPENDIX C

OPINION

(State of Michigan — Circuit Court — County of Oakland)

(Dated January 27, 1994)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. DR. JACK KEVORKIAN, Defendant — Case Number 93-129832-FH, Case Number 93-130248-FH; Hon. Jessica R. Cooper)

At a session of said Court, held in the Courthouse, City of Pontiac, County of Oakland, State of Michigan, on the 27th day of January, 1994.

PRESENT: Hon. Jessica R. Cooper

This matter comes before the court on defendant's motion to dismiss charges brought against him for assisting in the suicides of Merian Frederick and Dr. Ali Khalili.

The motion challenges the constitutionality of 1992 P.A. 270 as amended by 1993 P.A. 3. Said statute makes it a felony to intentionally provide the physical means to complete a suicide or participate in the physical act once one has knowledge of another's intention to commit suicide.

Dr. Kevorkian challenges this statute on the basis of both the Michigan and the United States Constitution. There does not appear to be any factual dispute that the defendant did in fact have knowledge of Merian Frederick's and Dr. Khalili's desire to commit suicide nor is there any dispute that the defendant physically provided the means to carry out the suicides.

I.
CONSTITUTIONAL RIGHT OF SELF-DETERMINATION

The defendant contends that the right of self-determination as derived under the Ninth and Fourteenth Amendments should be extended to include the right to terminate one's own life when faced with terminal illness and unbearable pain.

Defendant further contends that once that right has been defined to include suicide, it should then be extended to include the right to seek assistance to carry out that end.

Although not specifically addressed by the defendant in his brief, the defendant would have to have standing to derive the rights of these individuals and in that way challenge the constitutionality of the statute under which he is charged.

In order to address these arguments it is necessary to discuss both the privacy and liberty rights of an individual as balanced against the state's compelling interest to protect life.

(A)
PRIVACY

The first Eight Amendments to the United States Constitution express specific fundamental personal rights. The Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The Supreme Court in *Griswold* v *Connecticut*, 381 U.S. 479, 488, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1965), examined the history of the Ninth Amendment and found it to "reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those

fundamental rights specifically mentioned in the first eight constitutional amendments."

Essentially, the Ninth Amendment allows fundamental rights to be named at a later date. While the right to privacy is not mentioned specifically in the Constitution, "the Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe* v *Wade*, 410 U.S. 113, 152, 35 L.Ed. 2d 147, 92 S.Ct. 705 (1970). This right to privacy has been extended by case law to include "activities relating to marriage, procreation, contraception, family relationships, child rearing, education, and abortion.[1]

The court is not left to its discretion to ascertain which rights are fundamental. "The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions . . ." *Griswold*, *supra* at 493 (Goldberg, concurring) quoting *Powell* v *Alabama*, 287 U.S. 45, 67, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

The right of self-determination, the right to control one's own body, has long been recognized in the common law of the United States. "The right to one's person may be said to be a right of complete immunity to be let alone." *Matter of Conroy*, 98 NJ 321, 486 A 2d 1209 (1985) quoting Cooley on Torts, 29 and *Union Pac. Ry. Co.* v *Botsford*, 141 U.S. 250, 251, 35 L.Ed. 734, 11 S.Ct. 1000 (1891).

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[1] *Loving* v *Virginia*, 388 US 1, 18 L.Ed 2d 1010, 87 S.Ct. 1817 (1967); *Skinner* v *Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 62 S. Ct. 110 (1942); *Eisenstadt* v *Baird*, 405 U.S. 438, 31 L.Ed. 2d 349, 92 S. Ct. 1029 (1972); *Prince* v *Massachusetts*, 321 U. S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944); *Pierce* v *Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925); *Meyer* v *Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923); *Roe* v *Wade*, *supra* at 152.

In 1914, the esteemed Justice Cardozo also recognized the importance of a right of self-determination, stating: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ." *Schloendorff* v *Society of New York Hosp.*, 211 NY 125, 129-30, 105 N.E. 92 (1914). Courts have also noted that the "sanctity of individual free choice and self-determination are *fundamental* constituents of life, and the value of life may be lessened rather than increased by the failure to allow a competent human being the right of choice." *Matter of Conroy*, *supra* at 1224, citing *Superintendent* v *Saikewicz*, 373 Mass 728, 370 N.E. 2d at 426 (1977).

Once a fundamental right is established, it does not exist without restraint. Regulation by the state continues even in the area of fundamental rights. The Supreme Court has held when fundamental rights are involved, regulation designed to limit those rights may only be justified by a "compelling state interest." *Roe*, *supra* at 155. This legislative enactment "must be narrowly drawn to express only the legitimate state interests at stake." *Griswold*, *supra* at 485. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v *Button*, 371 U.S. 415, 438, 9 L.Ed. 2d 485,835 S.Ct. 328 (1963).

(*B*)
LIBERTY

Further evidence of the fundamental nature of self-determination lies in the area of liberty. The Fourteenth Amendment "provides that no state shall deprive any person of life, liberty, or property without due process of law". The United States Supreme Court in *Cruzan* v *Director, Mo. Dept. of Health*, 497 U.S. 261, 111 L.Ed. 2d 224, 110 S.Ct. 2841 (1990), acknowledged that a competent person has a constitutionally protected liberty

interest in refusing unwanted medical treatment. *Cruzan, supra* at 278.

While the court in *Cruzan*, cited language indicating the right of self-determination to be a fundamental right, it declined to characterize it as such or apply a balancing test as against that right. The Supreme Court merely declared the right to refuse unwanted medical treatment as a right under liberty which is allowed when clear and convincing evidence of the intent of the incompetent can be shown.

When dealing with the issue of control over an individual's body, historically it has been deemed a fundamental right. The *Roe* court expressly recognized it as such and the *Cruzan* court indicated in dicta that it was fundamental as well. Thus, before a state may attempt to regulate a fundamental right, whether derived from the privacy right of the Ninth Amendment or the liberty rights contained in the Fourteenth Amendment, a state must show a compelling state interest. While it is clear that the right of self-determination is fundamental under the right to privacy and liberty, no appellate court has yet to declare that the right of self-determination can be defined as the right to commit suicide.

However, for purposes of this argument only, let us assume that the right to self-determination includes the right of a competent individual to choose to end his or her own life. The question then becomes: When does the state acquire a compelling state interest in overriding the fundamental right of the individual?

(*C*)
STATE REGULATION

The state has always had and will continue to have an interest in the prevention of suicide. The issue is whether the state's compelling interest lessens or

abates in the case of a terminally ill individual seeking to end his life because of unbearable pain.

To regulate here is to regulate in an area of uncertainty; to protect those who do not wish to be protected, but foremost, to protect those who can not be protected. The inquiry here is whether the state is prolonging a life or prolonging the dying process. If in the opinion of the sufferer "death is not the worst situation you can be in"[2] does the state have the right to override the sufferer's decision to accelerate death by a blanket prohibition?

The distinction between protecting a life and prolonging dying is one which has been addressed in the case law before. The Michigan Court of Appeals stated *In re Rosebush*, 195 Mich App 675, 491 NW 2d 633 (1992), that while the "state has an interest in the prolongation of life, the state has no interest in the prolongation of dying . . ." *Rosebush*, *supra* at 686. Furthermore, the court concluded that "the decision whether to end the dying process is a personal decision for family members or those who bear a legal responsibility for the patient." *Rosebush* at 686. It was also noted by the New Jersey court in the case of *In re Quinlan*, 70 NJ 10, 355 A.2d 326 (1975) that "the State's interest 'weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.'" The State's interest in the preservation of life is paramount, especially when the bodily invasion is curable but the State's interest loses its powerful stance where "the issue is not whether, but when, for how long, and at what cost to the individual a life may be briefly

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2 See Alida Brill, *Nobody's Business: The Paradoxes of Privacy*, p. 156, quoting the Supreme Court brief filed for Nancy Cruzan's family.

extended." *Superintendent* v *Saikewicz*, *supra* at 742, citing Cruzan, *supra* at 276.

Again, assuming arguendo that an appellate court extends the right of self-determination to include suicide or that the legislature makes that determination on their own, it does not necessariiy follow that the state is without any interest in protecting a terminally ill patient who expresses the desire to end his or her life with the assistance of another.

Clearly, the state has a compelling interest in regulating the assister. There are inherent dangers in allowing a person to assist another in committing suicide. The state has an obligation to ensure that the terminally ill person is not merely overcome by depression, family or financial pressure to end existence. The decision to end life should be evaluated by individuals or commissions who are not seeking financial gain, fame or the furtherance of their own agenda. Proper protocol must be established and enforced. The nature and extent of that regulation is obviously the prerogative of the legislature.

(*D*)
JUS TERTII STANDING

If a terminally ill sufferer has the right to self-determination which may include suicide, the issue then becomes whether that individual has the right to seek the assistance of someone else in carrying out the desire to end life. May a sufferer seek a protected right of assistance in suicide with the assister being immune from prosecution? For that to occur, the assister must be able to assert the fundamental rights of the sufferer.

Dr. Kevorkian contends that, in essence, he derives the rights of the sufferer. Such a conclusion is, in fact, error.

The right of self-determination under the Ninth and Fourteenth Amendments are rights that are specific to the individual. Defendant, to succeed in a challenge under these amendments, must prove constitutional *jus tertii*.[3] He must demonstrate his entitlement to acquire the rights of the sufferer. Three factors must be evaluated to assert jus tertii: 1) the relationship of the litigant whose rights are being asserted, 2) the ability of the person to advance his own rights, *and* 3) the impact of the litigation on third-party interests. *Caplin & Drysdale* v *United States*, 491 U.S. 617, 623, Footnote 3, 105 L.Ed. 2d 528, 109 S.Ct. 2646 (1989). The relationship between Dr. Kevorkian and the decedents in the instant cases was limited at best. The defendant was not the sufferers' *treating* physician. Unlike the physician in *Griswold, supra*, defendant does not have a "special relationship" with his patient.[4] More importantly, Dr. Kevorkian is no longer a physician *licensed* to practice medicine in the State of Michigan.[5]

The second factor the court must evaluate is the ability of the defendant to advance his own rights. Defendant in this action has standing to attack the Michigan statute at issue under the Michigan Constitu-

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[3] Jus tertii: "a party's ability successfully to challenge a law or government action on the ground that it violated third parties' constitutional rights", Robert Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 Cal. L. Rev. 1308 (1982).

[4] The court in *Griswold*, labelled the physician's ability to assert the rights of the patient's as standing, but relied on cases such as *Barrows* v *Jackson*, 346 U.S. 841, 98 L.Ed. 361, 74 S.Ct. 19 (1953) and *Pierce* v *Society of Sisters, supra*. These cases acknowledged the doctrine of jus tertii. Though the court in *Griswold* did not explicitly refer to the three part test, it noted that third parties need to have their rights considered in a suit involving a person who stood in a confidential relationship to them.

[5] As of November 22, 1991, Dr. Kevorkian's license was suspended.

tion. He can and has objected to its form and its scope.

Thus, he has adequate means to challenge the validity of the law without asserting third party rights. He therefore fails to meet the second requirement of jus tertii standing.

With regard to the third factor, the individuals in these cases who may have had a right of self-determination were free to advance their own rights. If the individual has the ability to assert these rights, (and allegedly both suicides in the cases at bar were able to make video tapes before their demise) the court may deny another party from acquiring those rights. To allow otherwise would be to nullify the general rule. "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton* v *Wulff*, 428 U.S. 106, 49 L.E. 2d 826, 96 S.Ct. 2868 (1976).

The Court has followed the analysis of the parties with regard to self-determination with several bold assumptions couching its language in "ifs" and "mays" The issue is of grave import to the jurisprudence of the state and indeed to its citizens.

It was necessary to complete the analysis in order to reach the issue of jus tertii standing. However, because this court has determined that Dr. Kevorkian does not have jus tertii standing, this court is without a justiciable issue to clearly determine the rights of terminally ill sufferers as balanced against the state's interest.

It is therefore the finding of this court that Jack Kevorkian has no entitlement to assert the fundamental right to self-determination of another.

II.
OVERBREADTH AND VAGUENESS

Defendant specifically challenges MCLA 752.1027 on the basis of constitutional overbreadth.[6] This issue must also be decided on the basis of standing.

"For the defendant to have standing to challenge the statute on overbreadth, the statute must be 'overbroad in relation to the defendant's conduct.' One may not constitutionally challenge a statute on grounds of overbreadth against him when the statute clearly applies." *People* v *Green*, 123 Mich App 565, 332 NW 2d, 610 (1983), quoting *People* v *Burton*, 87 Mich App 598, 274 NW 2d 849 (1978).

While there very well may be an argument with regard to the statute's failure to clearly distinguish between active and passive behavior, Dr. Kevorkian's own conduct clearly fits within the statute.

MCLA 752.1027, MSA 28.547(127) provides a criminal penalty for a person who has knowledge of another's intent to commit suicide and then intentionally a) provides the physical means to complete the suicide or b) participates in the physical act. The defendant has publicly admitted to assisting the two suicides that are the subject of the criminal charges now pending against him. Defendant was intentionally present with the individuals at the time of their death and provided the means with which the suicides were accomplished.

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6 A statute is to be invalidated as void for vagueness when it leaves discretion in the hands of the judges, or prosecutors. Generally stated, "the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v *Lawson*, 461 US 352, at 357, 75 LEd 2d 903, 103 S.Ct 18 (1983).

Irrespective of whether the statute covers constitutionally protected acts, as to this defendant, the statute is not overbroad, as his conduct clearly falls within its application. Therefore, his challenge must fail.

III.

EQUAL PROTECTION, DUE PROCESS
& NON-DELEGABLE FUNCTION

This court has thoroughly reviewed defendant's positions with respect to those issues labelled in his brief as equal protection, due process and non-delegable function. The defendant cites no substantive authority for his contentions. Further the court finds that defendant's arguments are not persuasive and, therefore, do not merit further discussion.

IV.

MICHIGAN CONSTITUTION 1963
ARTICLE 4 SECTION 24

Lastly, the defendant asserts that the amendment of House Bill 4501 to include a provision making assisted suicide a criminal offense violates both the title-object and change of purpose prohibitions of the Michigan Constitution 1963, Art. 4, § 24.

Dr. Kevorkian has direct standing to challenge the propriety of the enactment of this law since he is charged under the statute and faces criminal prosecution and the potential loss of liberty.

(A)

TITLE – OBJECT

The Michigan Constitution, Article IV, Section 24, provides that:

> "No law may embrace more than one object, which shall be expressed in its title."

House Bill 4501 (H.B. 4501) was initially introduced on March 7, 1991, to create a commission on death and dying. The bill determined the membership of the commission, their duties and their obligation to recommend to the state legislature any potential legislation dealing with assisted suicide.[7]

There was no provision to criminalize the act of assisting a suicide in any part of the original H.B. 4501. In fact, the bill required the committee to make a recommendation on "the desirability of criminalizing suicide or attempted suicide.[8] Public hearings were held on the bill on December 19, *1991*. However, on November 12, 1992 an amendment[9] was added to the bill which created the felony of assisted suicide. This amendment was added without the benefit of any further hearings. Twelve (12) days later, on November 24, 1992, the amendment was adopted and passed. It went immediately to the State Senate, was passed and was ultimately signed by the Governor on December 15, 1992. The bill was to take effect on March 30, 1993 as 1992 P.A. 270.[10]

The courts of our state have long recognized the title-object provision of the Michigan Constitution which was designed to prohibit "the practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection." *People* v *Mahaney*, 13 Mich 481, 494-5 (1865).

The meaning of "necessary connection" has evolved into two lines of thought. The first is that title object

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7 H.B. 4501, Section 4.

8 H.B. 4501, Section 4(c)(i)(c).

9 Designated as H-4.

10 A subsequent bill SB 211 signed into law as 1993 P.A. 3 advanced the start date to February 25, 1993.

will not be "objectionable so long as it introduces nothing foreign and incongruous, but is confined to the means supposed to be important to the end indicated" *Mahaney*, *id* at 496.

The second line of cases would find the title object rule violated if the "objectionable provision could have been enacted in a separate law without either referring to or supporting the other." *Hildebrand* v *Revco*, 137 Mich App 1, 7; 357 N.W. 2d 778 (1984), Lv. Den. 422 Mich 920 (1985) citing *Kent County, ex rel Bd of Supervisors* v *Reed*, 243 Mich 120; 219 N.W. 656 (1928).

Under either line of thought, it is clear that the title-object provision has been violated in H.B. 4501. The purpose of the establishment of the commission was to *study* issues on death and dying. The establishment of a crime within that same bill is foreign and incongruous.

Although the crime and the commission's study related to the same *subject*, the creation of a crime and the creation of a commission are two distinct objects. It does not follow that a legislature can amend an act designed to educate themselves on the public viewpoint of death and dying by making a conclusion prior to the study. Additionally under the test of *Reed*, *supra*, the felony provision could have been enacted in a separate law. The two objects are not germane to each other.

The prosecutor cites the case of *People* v *Trupiano*, 97 Mich App 416, 296 NW 2d 49 (1980) in support of its contention of constitutionality. In *Trupiano*, the legislature amended an act which would provide for certain crimes to be listed under the Health Code as opposed to the General Penal Code. However, the purpose of the Health Code was to set into codification the various proscriptions and penalties on the use of controlled substances. Its object was to codify and unify those

laws necessary to protect and promote the public health.

It is clear to this court that codification and unification was not the purpose or intention of House Bill 4501.

The purpose of the commission was to study and make non-binding recommendations for potential legislation. The commission was given no regulatory authority. The amendment created an addition to the Michigan Penal Code. It *created* a *felony*. The two objects are not germane to each other. Therefore, 1992 P.A. 270 violates the title-object provision of the Michigan Constitution.

(*B*)
CHANGE OF PURPOSE

The Michigan Constitution also provides at Article IV, Section 24 that:

> "No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title."

Our Supreme Court noted in *Anderson* v *Oakland County Clerk*, 419 Mich 313, 329, 353 NW 2d, 448 (1984), that the intent behind the Change of Purpose provision was "to preclude last minute hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative intent." H.B. 4501 was initially enacted to create a commission to prepare a study. The public was invited to hearings on the original bill. The November 12, 1992 amendment to H.B. 4501 on the House Floor created a crime. The public was not given notice of the new provision and within a

month[11] H.B. 4501, as amended on the House Floor, became law.[12]

The test for change of purpose is "whether or not the change represented an amendment or extension of the basic purpose of the original or the introduction of entirely new and different subject matter." Anderson, *supra*, citing *United States Gypsum Co.*, v *Department of Revenue*, 363 Mich 548; 110 NW 2d 698 (1961). Under that test, Michigan's Change of Purpose provision has been violated. The original purpose was to create a commission to study a problem; the amendment created a crime, allegedly solving the problem the commission sought to study. These are entirely different purposes.

The question of the validity of H.B. 4501, as amended has been brought before the legislature many times prior to the plethora of litigation. In the Legal Research Division Memorandum of March 27, 1991,[13] the legislature was advised that constitutional violations as well as standing rules of the House may be applicable to find the amendment unconstitutional.

In the House Legislative Analysis Section of H.B. 4501 (Second Analysis) formally released on December 17, 1992,[14] two days after the governor signed the bill into law, it was again argued that this bill might not stand up to constitutional scrutiny.

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11 **The Governor signed H.B. 4501 into law on December 15, 1992.**

12 **1992 P.A. 270.**

13 **See Legislative Service Bureau, Legal Research Division Memorandum by Gary Brian Gulliver, Director of Legal Research, March 27, 1991.**

14 **See House Legislative Analysis Section, House Bill 4501 as enrolled, Second Analysis, December 17, 1992.**

An interim memo issued just 11 days after the amendment of H.B. 4501 (and one day before it was passed in the House) did not speculate on the constitutionality. It *concluded* that:

> "Adding the Palamara-Ciaramitaro Amendments to House Bill 4501 *would violate*, the single-object and change-in-purpose rules of Article IV, section 24 of the Michigan Constitution *as well as* the germaneness requirement of rule 59 of the Standing Rules of the Michigan House of Representatives."[15]

While these legislative memos do not rise to any level of authority, they are cited to indicate that even the legislature's own House Council have serious doubts as to the statute's constitutionality. The prosecution argues that any constitutional infirmities that existed in 1992 P.A. 270 were cured by the enactment of 1993 P.A. 3.[16] He cites *Lahti* v *Fosterling*, 357 Mich 578, 588, 99 NW 2d 490 (1959) in furtherance of his argument:

> "where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there." *Lahti, supra* at p. 588

The problem with the prosecution's argument lies in the definition of amendment. *Black's Law Dictionary* defines "amendment" as a change or modification for the better.[17] 1993 P.A. 3 did not alter, change or modify

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15 **See House Judiciary Committee Memorandum by David Sobelsohn, Counsel, House Judiciary Committee, November 23, 1992.**

16 **See 1993 P.A. 3.**

17 **Black's Law Dictionary – Page 81 (6th Ed. 1990).**

the *text* of 1992 P.A. 270. It merely 1) added the code sections which accompanied the listed acts and 2) moved up the effective date of the law to be effective immediately. These were clearly not substantive amendments.

To allow a defective act to be made suddenly constitutional by such a procedural amendment would negate the purpose of title IV section 24. Additionally the amendments, whether procedural or substantive, simply do not resolve either the title-object or the change of purpose violations.

It is the province of the Legislature to enact laws. Yet their actions must be within the bounds of the Constitution. H.B. 4501 was not enacted in accordance with constitutional procedural requirements as provided by the Michigan Constitution of 1963, Article 4, § 24 and is therefore for the reasons stated herein declared invalid.

CONCLUSION

There are in our society terminally ill individuals whose lives are beset with unbearable pain and agony and who have determined for themselves, and/or with the help of family, a desire to end their pain by ending their lives.

Yet this court recognizes that the concept of aiding and assisting a suicide is fraught with potential danger and abuse.

The issues raised are of grave concern to all of the citizens of the state regardless of their position on the subject. Certainly, the public and the legislature need to address these issues in an atmosphere devoid of hysteria and rhetoric.

The defendant has challenged his prosecution under the assisted suicide statute under both the state and federal constitutions.

This court finds that defendant, Dr. Jack Kevorkian, is without jus tertii standing to assert the privacy and liberty rights of third parties.

The court further declares that Dr. Kevorkian does not have standing to challenge the assisted suicide statute on the grounds of vagueness and overbreadth because his admitted participation comes within the ambit of the statute's prohibitions.

However, with regard to the defendant's challenge to the statute under the Michigan Constitution 1963, Article 4, Section 24, the court finds that the statute violates both the title-object and change of purpose prohibitions of the Constitution and is therefore invalid.

ACCORDINGLY, the cases pending before this court are HEREBY DISMISSED.

/s/ Hon. Jessica R. Cooper

(Certification Omitted)

APPENDIX D

OPINION

(State of Michigan — Circuit Court — County of Wayne)

(Dated December 13, 1993)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -v- JACK KEVORKIAN, Defendant — Case No. 93-11482; Hon. Richard C. Kaufman)

The defendant, Jack Kevorkian, is charged with violating section 7(1) of 1993 PA 3 (the Act), MCL 752.1027(1). This statute makes it a felony either to provide the physical means or to participate in a physical act by which another person attempts or commits suicide.

Presently before the Court is defendant's motion to dismiss. In this motion it is argued that either the Act generally or sec. 7(1) specifically is unconstitutional for a variety of reasons. For the reasons more fully explained below, however, the Court finds that none of the arguments, save one, posed by defendant have merit, and that as to one of defendant's arguments, a decision is premature, because that issue cannot be decided based upon the existing record in this case. Consequently, defendant's motion is denied as to all his claims, except one claim that is not ripe for decision.

I.

THE ACT DOES NOT VIOLATE CONST 1963, ART 4, § 24

In defendant's motion, it is contended that the Act violates Const 1963, art 4, § 24 because it has more than one object or its original purpose was changed during its passage through the legislature. The Court reviews the former argument initially.

A.

TITLE-OBJECT CLAUSE

Const 1963, art 4, § 24, the so-called title-object clause of the Michigan Constitution, provides in pertinent part:

> *No law shall embrace more than one object*, which shall be expressed in its title. (Emphasis added).

Defendant asserts that the Act violates the single object proviso of art 4, § 24 because it has two purposes, namely, the creation of a commission to study issues relating to suicide and assisted suicide, and the enactment of criminal penalties for certain acts of assisted suicide. In so arguing, defendant notes that the predecessor to the Act, 1992 PA 270, in its original form only provided for the creation of a commission to study issues relating to suicide and assisted suicide, and that criminal sanctions were only inserted by way of amendment. Also, defendant emphasizes that the two purposes of the Act constitute multiple objects because they have no necessary connection. This latter argument is based on language found in case law which, in construing the title-object clause, explains that "the title-object clause is only violated where the subjects are so diverse in nature that they have no necessary connection." *See*, *Builders Square* v *Dept of Agriculture*, 176 Mich App 494, 496-497 (1989). Indeed, as noted by defendant, emphasis on this dicta led another circuit court to find the Act violative of the title-object clause. *See*, *Hobbins, et al* v *Attorney General*, Wayne County Circuit Court, Case No. 93-306178-CZ, Opinion dated May 20, 1993, p 9. In that Opinion, p 10, the Court found the Act violative of the title-object clause because its provisions could have been enacted separately, relying on *Advisory Opinion re Constitutionality of 1975 PA 227*, 396 Mich 123, 133 (1976).

In considering these arguments, it is useful to remember the admonition in *Builders Square*, *supra*, 496:

> It is well established that legislation challenged on a constitutional basis is clothed in a presumption of constitutionality . . . . Every reasonable presumption must be indulged *in favor of an act's constitutionality*. (Emphasis added; citations omitted).

Moreover, as noted in *Kuhn* v *Dept of Treasury*, 384 Mich 378, 387-388 (1971):

> This Court has long and consistently said that art 4, § 24, and similar "one object" provisions in earlier constitutions, are to be construed reasonably "and not in so narrow and technical a sense as unnecessarily to embarrass legislation." *Ryerson* v *Utley* (1868), 16 Mich 269, 277, citing *People, ex rel Drake* v *Mahaney*, (1865) 13 Mich 481, 494.

Thus, the goal of the title-object clause is not to restrict legislation, but rather to prevent the legislature from engaging in the former practice of securing the passage of several diverse measures in a bill, no one of which could succeed on its merits, and to ensure that legislators had notice of the intention and effect of laws considered by them. *Mahaney*, *supra*, 494.

Presently there are several formulas used for determining whether the title-object clause has been violated. In addition to focusing on whether an act contains subjects so diverse in nature that they have no necessary connection or whether the provision could have been separately enacted, see *Advisory Opinion*, *supra*, 396 Mich 131, other decisions inquire as to whether the provisions of an act "directly relate to carry out and implement the principal object." *City of*

Livonia v *Dept of Social Services*, 423 Mich 466, 497 (1985). In this connection, it is well recognized that the object of a law is its general purpose, *Id*, and that a statute may authorize the doing of all things which further its general purpose. *Kuhn, supra*, 387-385 [sic]. Still another line of inquiry asks whether the subjects of the act are wholly foreign or incongruous to each other. *See, Advisory Opinion, supra*, 396 Mich 131-132.

Merely because different provisions of an act could be passed in separate legislation is not sufficient to cause a court to find an act unconstitutional. Indeed, as noted in *Mahaney, supra*:

> To require that every end and means necessary to the accomplishment of [the] general object should be provided for by a separate act relating to that alone, would not only be senseless but would actually render legislation impossible.

Indeed, in *Advisory Opinion, supra*, that the provisions of the act could have been separately enacted was cited as an auxiliary reason or factor for finding a violation of the title-object clause, and not the sole reason. Rather, the Court focused on the substance of the provisions and the extent to which they were diverse or incongruent.

Also, excessive emphasis should not be placed on whether the subjects of an act have a "necessary connection." This phrase first appears in dicta in *Mahaney, supra*, 495, and not as a measure of whether the title-object clause has been violated, but rather the Court's discussion of its purpose. Moreover, in a case decided subsequent to *Mahaney*, the Court found that while there was no necessary connection between the provisions of an act, still the act was not violative of the

title-object clause since, as found by the Court, the connection was a "natural one", and the subjects were germane to each other. *Attorney General* v *Weiner*, 59 Mich 580, 588 (1886). With the foregoing observations in mind, the Court turns to an examination of the Act itself.

The title of the Act provides:

> An act to prohibit certain acts pertaining to the assistance of suicide; to provide for the development of legislative recommendations concerning certain issues related to death and dying, including assistance of suicide; to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to prescribe penalties; and to repeal certain parts of this act on a specific date.

Within the Act a commission on death and dying is created whose purpose is to study problems associated with suicide and assisted suicide with a view toward developing recommendations for legislation. Sections 1 through 6 of the Act revolve around the establishment of the commission and its work. Section 7 makes certain forms of assisting suicide a felony.

In reviewing the Act along with its title as a whole, it is evident that the Act has one purpose, namely, to address the subject of suicide and assisted suicide. Certainly germane and not incongruous to this general purpose would be a provision to criminalize certain forms of assisted suicide as well as the creation of a commission to further study the issue. Also, while in a technical sense these two provisions may have no absolute necessary connection to each other, or may have been enacted separately, a narrow or technical application of the title-object clause is to be eschewed. *Kuhn*, *supra*.

Rather, these provisions can be said to have a rational connection to each other in that the Act's criminal provision, whose existence is temporally tied to the work of the commission created by the Act, see MCL 752.1027(5), can be seen by the legislature as a type of moratorium on assisted suicide for a period of time during which more permanent regulatory measures can be considered and enacted. Seen in this light there is a certain natural fit between these provisions of the Act and they can be said to be germane to one another. *Weiner, supra.*

Beyond these considerations, this Court also notes that the underlying purposes of the title-object clause have not been violated. There is no evidence of logrolling. That is, there is no suggestion that the Act is a patchwork of provisions none of which could have been enacted separately. Given that the provisions relating to criminal penalties and the creation of a commission were expressly stated in the Act's title, and the Act itself is relatively short, there can be no argument that the legislators who considered and voted on it did not have notice of the Act's content. Also, at least by the time the Act was passed, its provisions were well publicized. Hence, the purposes of the title-object clause have been satisfied.

Accordingly, for all the foregoing reasons, the Court finds that the Act does not violate the title-object clause of the Michigan constitution.

B.

CHANGE PURPOSE CLAUSE

Defendant also argues that art 4, § 24 was violated because the Act's original purpose was changed by way of amendments. In this connection, the following provision of art 4, § 24 is relevant:

> No bill shall be altered or change its original purpose as determined by its total content and not alone by its title.

Defendant argues that the change purpose clause has been violated because section 7 was added as an amendment to HB 4501 which was enacted as 1992 PA 270. 1992 PA 270 was subsequently amended by the Act (*i.e.*, 1993 PA 3). Defendant's argument here is without factual merit. While it may be that 1992 PA 270 was at least open to the charge that it violated the change purpose clause due to HB 4501 being amended during the legislative process, no such circumstances exist with respect to the passage of the Act. There is no allegation that SB 211, which was enacted as the Act, was subject to any amendments which changed *its* purpose. Thus, while the Act's predecessor may have been open to an attack via the change purpose clause, factually this has no bearing on whether the Act is similarly defective — it is not.

Accordingly, the Court finds that the Act does not violate the provisions of the change purpose clause of the Michigan constitution.

2.

THE ACT DOES NOT PROVIDE FOR AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

Defendant also argues that the Act's criminal provision contains an unconstitutional delegation of legislative authority in that the determination of the date of the expiration of the criminal provision has allegedly been delegated to a commission. He asserts that Const 1963, art 4, § 1 is thus violated.

Art 4, § 1 provides:

> The legislative power of the State of Michigan is vested in a senate and a house of representatives.

It has been recognized that some legislative powers are simply not delegable. *People* v *Thurman*, 417 Mich 638, 649 (1983). Yet, as explained in *Thurman*, examples of these are to be found in the express provisions of the state constitution. *Id. Thurman* goes on to note that:

> 'many facets of traditionally 'legislative' power [may] be expressed by administrative agencies. Provided that sufficient standards and safeguards . . . are provided . . . .'

In this vein it is well recognized that:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make, its own action depend.
>
> *Florka* v *Detroit*, 369 Mich 568, 575 (1963).

Where a statute contains a standard for determining the fact precedent to a specified action, that statute does not constitute an unconstitutional delegation of legislative power. *Wayne Co Prosecuting Atty* v *Wayne Co Bd of Comm'rs*, 44 Mich App 144, 153 (1972), *lv den*, 389 Mich 768 (1973).

With the foregoing principles in mind, the Court examines the provisions of the Act which are relevant to this portion of defendant's argument.

Section 7(5) of the Act states that:

> This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4.

Based on these provisions, defendant asserts that there is an unconstitutional delegation to the commission of

the legislative power to determine when laws cease to be effective since, according to defendant, there is no guarantee when the commission will finish its work. While defendant concedes that, pursuant to section 4(1), the commission is required to submit its recommendations to the legislature "within 15 months after the effective date of the act," and that the Act does provide a date certain as to its effective date (February 25, 1993), see MCL 752.1024, 752.1027, defendant raises the specter that the commission will disregard this time limit and fail to make recommendations within 15 months of the Act's effective date.

There is little doubt that the legislature can lawfully include within an act a sunset provision which indicates when the act expires. *See*, for example, *Ace Tex Corp* v *Detroit*, 185 Mich 609 (1990), *lv den*, 437 Mich 986 (1991). Yet, there is nothing in our constitution which indicates that such a provision is so essential that it cannot be expressed so that the effectiveness of a law would end upon the happening of some event, even if when this occurred was dependent upon the acts of third parties. *Florka*, *supra*.

In reviewing the provisions of section 7 along with those of section 4, it is immediately obvious, contrary to defendant's characterization, that the legislature has set forth certain objectively ascertainable standards for determining when section 7 will expire. While this turns on when the commission acts, the commission's discretion to act is restricted by the legislature. Under section 4(1), the commission must act within 15 months of the effective date of the Act. In recognizing this, the Court rejects defendant's argument that the commission might violate the legislative dictate of section 4. This is based on pure speculation. Moreover, the law presumes that public officials will perform their duty. *Veldman* v *Grand*

Rapids, 275 Mich 100, 113 (1936). There is no evidence before the Court to suggest that the commission will not fulfill its duties in a timely fashion as prescribed in section 4, and it must, therefore, be presumed the commission will do so.

In sum, while the expiration of section 7 is made to turn on certain preconditions, these preconditions are sufficiently definite and the commission's discretion in when it must act is sufficiently limited.

Accordingly, this Court finds that section 7 does not contain an unconstitutional delegation of legislative power.

3.

SECTION 7(1) VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IS OVERBROAD

> "Questions surrounding the issue of suicide are not simply abstract intellectual puzzles; they are concrete human problems, encountered in many areas of human experience, rooted in human despair, delusion, and pain. But if we sometimes err in failing to see that suicide involves real people in real distress, we may also fail to see that it involves difficult and disputed theoretical issues, upon which depend the resolution of serious practical concerns."
>
> Battin & Mayo, eds, *Suicide, The Philosophical Issues* (1980), p 2.

This brings the Court to Defendant's most significant claim as to why this criminal case should be dismissed. Defendant argues that section 7(1) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides, in pertinent part,

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . .

Defendant argues that the right to terminate one's own life is a fundamental component of liberty protected by the Due Process Clause, especially where a person is terminally ill and in what is perceived by that person to be intolerable pain. Defendant argues that the concept of personal "liberty" embodied in the Due Process Clause protects some decisions to end one's life. Given this, defendant continues, it follows that the ban in section 7(1) on third persons assisting suicide constitutes an undue burden on that right and, hence, is unconstitutional.

This is defendant's most profound claim. Ultimately, the answer to this legal question will go a long way toward determining how our society responds to this controversial issue. At the same time, this Court is quite mindful that it is, at best, no more than a procedural way station on the way to a final legal result.

Nonetheless,[1] this Court acknowledges its awareness of the sensitive and emotional nature of the assisted suicide controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about assisted suicide.

This Court's task, of course, is to resolve the issue by constitutional measurement, free of emotion and of

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[1] **The following *two* paragraphs are a paraphrase from *Roe* v *Wade*, 410 US 113, 116; 93 S Ct 705; 35 LEd 2d 147 (1973).**

predilection. This Court seeks earnestly to do this. As the Court undertakes this task, it bears in mind Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v *New York*, 198 US 45, 76; 25 S Ct 539; 49 LEd 937 (1905):

> "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgement [*sic*] upon the question whether statutes embodying them conflict with the Constitution of the United States."

The constitutional challenge to the statute, under which defendant is criminally charged, involves two distinct inquiries. The first pertains to whether suicide or attempted suicide can ever be considered a component of the liberty interests protected by the Fourteenth Amendment. More precisely put, defendant's argument involves whether there are *any* circumstances under which a person's decision to end their life, and the attempted execution of that decision, is constitutionally protected because it falls within the concept of personal "liberty" embodied in the Fourteenth Amendment. Only if this question is answered affirmatively, does one reach the next question, namely, whether section 7(1) constitutes an undue burden on that right. Accordingly, the Court initially addresses the preliminary question.

The Due Process Clause's protection of liberty places substantive limits on the extent to which government may interfere with those fundamental interests which are encompassed within the term "liberty." As noted by Justice Brandeis in *Whitney* v *California*, 274 US 357, 373; 47 S CT 641; 71 LEd 1095 (1927), ". . . all fundamental rights comprised within the term liberty are protected by the Federal Constitution from the invasion by the

States." The real problem, however, is determining what rights are fundamental to those liberty interests protected by the Fourteenth Amendment. In large part, this involves a question of methodology.

The prosecutor argues that a right cannot be deemed fundamental, and thus entitled to protection through the "liberty" provision of the Fourteenth Amendment, unless it is based upon our Nation's history and tradition. In contrast, the defendant insists that history and tradition can be completely ignored in distilling the existence of a fundamental liberty interest. This Court rejects both approaches.

The prosecutor's view would place a straightjacket upon the Constitution, and not permit it to be the living, dynamic document that has endured for more than 200 years — a document that has guided our society through changing mores and attitudes; a document that permits protection of fundamental liberty and personal privacy, even when history and tradition would severely intrude in these areas. As recently noted by the Court in *Planned Parenthood of Southeastern Pa* v *Casey*, 505 US ___; 112 S Ct 2791; 120 LEd 2d 674, 695-696 (1992), in rejecting the argument that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified:

> But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an

> aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* v *Virgina*, 388 US 1, 12, 18 LEd 2d 1010, 87 S Ct 1817 (1967).

Thus, while historical analysis may have its uses, it cannot be the sole determiner of the question.

Defendant's view is also flawed. It presents an infinitely flexible methodology which would invite judges to constitutionalize any claimed right according to their own private philosophical or religious viewpoints. In rejecting such a position, the Court in *Casey*, *supra*, 120 LEd 2d 697, quoted with approval Justice Harlan's observation in *Poe* v *Ulman*, 367 US 497, 542; 81 S Ct 1752; 6 LEd 2d 989 (1961):

> . . . [I]f the supplying of content to this Constitutional concept has of necessity been a rational process, *it certainly has not been one where judges have felt free to roam where unguided speculation might take them*. The balance of which I speak is the balance struck by this country, *having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive*, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. (Emphasis added).

Indeed, defendant's approach is mistaken in that it essentially makes the guarantee of liberty in the Fourteenth Amendment "an empty vessel into which this Court is free to pour a vintage" that it thinks "better suits present day tastes." *National Broiler Marketing Assn*

v *United States*, 436 US 816, 827; 98 S Ct 2122; 56 LEd 2d 728 (1978).

Thus, the positions of both the prosecutor and the defendant, standing alone, are flawed. An approach that views these methodologies as separate, but related, is more appropriate and consistent with United States Supreme Court precedent. This point was recently made in *Bowers* v *Hardwick*, 478 US 186, 191-192; 106 S Ct 2841; 92 LEd 2d 140 (1986), where the Supreme Court reviewed the varying ways it has determined whether a certain right was a liberty interest protected by the Federal Constitution:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v *Connecticut*, 302 US 319, 325, 326, 82 LEd 288, 58 S Ct 149 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v *East Cleveland*, 431 US 494, 503, 52 LEd 2d 531, 97 S Ct 1932 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503, 52 LEd 2d 531, 97 S Ct 1932 (Powell, J.). See also *Griswold* v *Connecticut*, 381 US, at 506, 14 LEd 2d 510, 85 S Ct 1678.

The *Bowers* Court then proceeded to reject as fundamental the claimed liberty interest at issue in that case, and explained:

> Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. *Id*, 478 US 194.

In rejecting the claimed liberty interest at issue in that case, the *Bowers* opinion strongly implies the presence of two connected, but nonetheless, distinct routes, to determine the presence of a fundamental right protected by the "liberty" provision of the Fourteenth Amendment. The first route is to analyze whether the claimed right is "deeply rooted in this Nation's history and traditions." The second route is to consider whether the claimed right is "implicit in the concept of ordered liberty."

Consequently, an analysis of both our Nation's history and tradition and modern views of what is necessary to be implicit in the concept of ordered liberty is required. If both analyses lead in the same direction, the constitutional decision is clear. It is where the two analyses are murky, or lead to inconsistent results, that the correct constitutional decision is difficult to glean.

Further support for this view is found in *Griswold* v *Connecticut*, 381 US 479, 493; 85 S Ct 1678; 14 LEd 2d 510 (1965), where it was stated:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]" . . . as to be ranked as fundamental.

Here, the Court in almost the same breath requires an analysis of both "tradition" and the present "conscience of our people" to decide a liberty issue.

Also, as noted earlier, in *Loving*, *supra*, a case invalidating miscegenation statutes, the Court reached its result, notwithstanding that at the time of the passage of the Fourteenth Amendment, interracial marriage was barred in most states, by an appeal to history, noting that, "the freedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of happiness by free men." *Id*, 388 US 12. Implicit, however, in the Court's holding in *Loving* is a rejection of history and tradition which supported such racially-based statutes.

Most strikingly, in *Roe v Wade*, 410 US 113, 129-152; 93 S Ct 705; 35 L. Ed 2d 147 (1993), the Court justified its result, in part, by an appeal to history, noting, during the course of twenty-three pages of historical analysis that,

> [a]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. *Id*, 140.

Many commentators, however, have disputed the *Roe* Court's historical analysis. To the extent that *Roe*'s historical analysis is not totally accurate, the decision is grounded more in a contemporary view of what is "implicit in the concept of ordered liberty."

From the foregoing cases, it can be seen that, in determining what rights are secured by and included in

the concept of liberty, as that term is used in the Fourteenth Amendment, courts have viewed the issue as one that neeessitates both a review of society's past traditions and history, and consideration of the contemporary collective conscience. It is only after such a two-pronged inquiry that a court can reach the conclusion that a practice involves matters so personal or fundamental to one's personhood that they must be seen as part of the liberty protected by the Due Process Clause. Thus, our inquiry must begin by examining whether suicide or attempted suicide under any circumstances can be seen as so "deeply rooted in this Nation's history and tradition", *Griswold*, *supra*, that they must be seen as part of that liberty which is protected by the Fourteenth Amendment.

Preliminarily the Court notes that defendant seeks to limit the historical inquiry to the actions of a terminally ill person who is in intolerable pain. In that situation, defendant argues that the United States Supreme Court not only recognized a person's right to die, but pronounced a constitutional right to obtain assistance in ending one's life. *Cruzan* v *Director, Mo Health Dept.*, 497 US 261; 110 S Ct 2481; 111 LEd 2d 224. (1990)

The *Cruzan* Court held that a person had a right to refuse medical treatment even if this meant that in all probability the person would die. The basis for this holding was not a wide-ranging affirmation of the so-called right to die, but, rather, the common law tort doctrine of informed consent. Moreover, the Court expressly noted that its opinion was limited and that it was "not to attempt, by any general statement, to cover every possible phase of the subject." *Cruzan*, *supra*, 497 US 278. It is significant to this Court that while in Justice Scalia's concurring opinion, *Id*, 251-256, he found no distinction between refusing medical assistance and sui-

cide, this view was rejected, not only in the majority opinion, but also in one of the dissenting opinions.

The *Cruzan* court found no need to go beyond its narrow holding. While there is some logical force behind Justice Scalia's argument that no meaningful distinction exists between failing to do something that causes death, and doing some affirmative act that causes death, it will take a future United States Supreme Court case to cement that logic. In sum, *Cruzan*, while inviting, does not dictate the result of the instant constitutional analysis.

In examining the moral or legal history and tradition of our Country's attitudes, as well as western society's, toward suicide and attempted suicide, the evidence is mixed. There is a plethora of authority supporting the view that history and tradition strongly proscribed suicide and attempted suicide. See, Marzen, *Suicide: A Constitutional Right?*, 24 Duquesne Law Review 1, 17-63 (1985).

The common law in England treated suicide or attempted suicide as a crime with the penalty of ignominious burial and/or forfeiture of property. While this facet of the common law was not adopted in our Country, Marzen convincingly shows that this was not out of a recognition of an affirmative right to commit or attempt suicide, but rather it was rejected as:

> "unsuited to our institutions" because it inflicted punishment on the suicide's innocent family and on an unfeeling corpse, . . . Similarly, as time passed, criminal penalties were rarely imposed on attempts at suicide because the reaction of the populace was one of pity rather than vengeance. Decriminalization occurred because of a concern for the despondency or mental dis-

> order that was believed to prompt such deeds, not because suicide was regarded as a human right. *Id*, 99.

He also shows that, notwithstanding non-criminalization of suicide or attempted suicide, courts have overwhelmingly stated a societal and governmental policy against suicide. Pertinent decisions are found not only in the 19th Century, but well into this century. For example, in *State ex rel Swann* v *Pack*, 527 SW2d.377, 382 (Tenn, 1969) *cert den*, 424 US 954 (1975), the Tennessee Supreme Court said:

> An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave wrong and we hold that the state has a compelling interest in protecting the life . . . of its citizens.

On the other hand, history and tradition, for purposes of constitutional analysis, can be viewed in a much larger context. In *Roe*, the Court's historical analysis began with "ancient attitudes." Just as the *Roe* Court found some support for abortion being freely practiced in Greek and Roman times, there is significant support that historical attitudes toward suicide were not in line with a blanket proscription. The idea that one's honor or one's quality of life would allow society to recognize the act of suicide as not contrary to societal norms has great historical support.

Much of what we know about Greek society supports the conclusion that suicide in many circumstances was acceptable.

> "Plato also allowed for moderation in the other sense. He suggested that if life itself became immoderate, then suicide became a rational, jus-

> tifiable act. Painful disease, or intolerable constraint were sufficient reasons to depart."
>
> ". . . Within a hundred years of Socrates' death, the Stoics had made suicide into the most reasonable and desirable of all ways out."
>
> Alvarez, *The Background*, in Battin & Mayo, *supra*, 7, 19.

These attitudes toward suicide continued during Roman times.

> "The evidence is, then, that the Romans looked on suicide with neither fear nor revulsion, but as a carefully considered and chosen validation of the way they had lived and the principles they had lived by."
>
> ". . . According to Justinian's Digest, suicide of a private citizen was not punishable if it was caused by 'impatience of pain or sickness, or by another cause,' or by 'weariness of life . . . lunacy, or fear of dishonor.' Since this covered every rational cause, all that was left was the utterly irrational suicide 'without cause,' and that was punishable . . ." *Id*, 22.

Presently, the teachings of mainstream Christian and Judaic faith find suicide anathema. Yet, Alvarez points out that this was not always the case:

> "The idea of suicide as a crime comes late in Christian doctrine, and as an afterthought. It was not until the sixth century that the Church finally legislated against it, and then the only Biblical authority was a special interpretation of the Sixth Commandment: 'Thou shalt not kill.' The bishops were urged into action by St. Augustine; but he, as Rousseau remarked, took

his arguments from Plato's *Phaedo*, not from the Bible.'" *Id*, 12-13.

Alvarez indicates that when the Christian Church decided to adopt a prohibition on suicide it had a difficult time in supporting this new position on the basis of the Scriptures:

> "They also reflect the difficulty the church had in rationalizing its ban on suicide, since neither the old nor the New Testament directly prohibits it. There are four suicides recorded in the Old Testament — Samson, Saul, Abimelech and Achitophel — and none of them earns adverse comment. In fact, they are scarcely commented on at all. In the New Testament, the suicide of even the greatest criminal, Judas Iscariot, is recorded as perfunctorily; instead of being added to his crimes, it seems a measure of his repentance. Only much later did the theologians reverse the implicit judgment of St. Matthew and suggest that Judas was more damned by his suicide than by his betrayal of Christ. In the first years of the Church, suicide was such a neutral subject that even the death of Jesus was regarded by Tertullian, one of the most fiery of early Fathers, as a kind of suicide." *Id*, 12.

Although theologically rooted in the concept of the sanctity of life, the change in Christianity's attitude toward suicide was, as Alvarez persuasively argues, primarily motivated by practicalities. He explains that the cult of martyrdom led to a rapid increase of actual suicide in the name of religion. In order to preserve its numbers the early Church needed to stop this practice:

> "Viewed from the Christian Heaven, life itself was at best unimportant; at worst, evil: the fuller the

> life, the greater the temptation to sin. Death, therefore, was a release awaited or sought out with impatience. In other words, the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became. Even the most stoical Romans committed suicide only as a last resort; they at least waited until their lives had become intolerable. But for the primitive Church, life was intolerable whatever its conditions. Why, then, live unredeemed when heavenly bliss is only a knife stroke away? Christian teaching was at first a powerful incitement to suicide." *Id*, 25.

As can be seen from this historical analysis, attitudes towards suicide in western civilization evolved with radical changes.

> "An act which during the first flowering of Western civilization had been tolerated, later admired, and later still sought as a supreme mark of zealotry, became finally the object of intense moral revulsion. When, in the late Renaissance, the question of the individual's right to take his own life once more arose, it seemed to be challenging the whole structure of Christian belief and morals. Hence the deviousness with which men like John Donne began once again to argue the case for suicide after a gap of more than a thousand years." *Id*, 29.

In the last hundred years or so, the grip of the Church's blanket prohibition against suicide has begun to ease.

> "The shift is from the individual to society, from morals to problems. Socially, the gains were enormous: the legal penalties gradually dropped away; the families of successful suicides no longer found themselves disinherited and tainted with the suspicion of inherited insanity; they could bury their dead and grieve for them in much the same way as any other bereaved. As for the unsuccessful suicide, he faced neither the gallows nor prison but, at worst, a period of observation in a psychiatric ward; more often, he faced nothing more piercing than his own continuing depression." *Id*, 30.

Recognition of these historical attitudes of western civilization toward suicide appears in *Roe*. In *Roe*, *supra*, 410 US 132 the Court wrote,

> . . . only the Pythagorean school of philosophers frowned upon the related act of suicide.

The *Roe* Court goes on to determine that the Pythagorean school was a minority view,

> and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."
>
> Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) "give evidence of the violation of almost every one of its injunctions." But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in

> agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." *Id*, 132.

It is striking that so much of the historical analysis of the *Roe* Court with respect to abortion mirrors historical traditions with respect to suicide.

The foregoing review of our Country's history and tradition does not reflect an unequivocal result, but one that is murky. While it may be that the view which proscribes suicide or attempted suicide currently predominates, nevertheless there is significant support in our traditions and history for the view approving suicide or attempted suicide. An appeal to history and tradition, thus, cannot determine the result of this constitutional question. Rather, the Court must proceed to determine whether the right to commit suicide or attempt suicide is ever part of the implicit concept of ordered liberty.

Thus, this Court must turn its analysis to the question of whether the implicit concept of ordered liberty as described by the United States Supreme Court in various cases necessariiy includes some protection under some circumstances for a person's decision to end their life.

In giving substance to this prong of the analysis, this Court is guided by the description of what sorts of concerns are included in those interests that are implicit in the concept of ordered liberty, found in *Casey*, *supra*, 698,

> *These matters* involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and

> autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. (Emphasis added).

At oral argument the prosecutor contended that this passage was not relevant to our case simply because its introductory phrase "[t]hese matters" referred to a class of cases, cited immediately before this paragraph, which involved personal decisions concerning marriage, procreation, contraception, child rearing or educational choices. *Id*, 698. True, our case involves none of these interests per se. Nevertheless, the broad language of the paragraph is useful to our analysis in that it gives a general description of what sort of particular interests the Court has in the past determined to be implied in the concept of ordered liberty.

In viewing the problem in the light of the foregoing language found in *Casey*, there can be little doubt that the decision to commit suicide involves an intimate and personal choice, and given the nature of the decision certainly ranks among the most important that a person may make concerning one's own being. As succinctly put by the Court in *Cruzan*, *supra*, 281,

> The choice between life and death is a deeply personal decision of obvious and overwhelming finality.

In this Court's view, therefore, the decision to commit suicide, at least under some circumstances, can be deemed to be implicated in the concept of ordered liberty.

Yet, analyzing the problem through the prism of the personal interests at stake is not the sole factor. Another necessary component of the equation is the interest of the state. *Casey*, *supra*, 710. Indeed, as explained in *Casey*, it was precisely the state's interest in preserving life that led the Court in *Roe* to formulate the trimester approach to determining the character of a woman's right to obtain an abortion, *Id*, 711, and which also guided the Court's analysis in *Casey*, *supra*, 714. It is significant that under this analysis, depending on the strength of the state's interest, the state could under some circumstances proscribe abortion altogether. Thus, in our case, it is appropriate to examine the state's interest in proscribing suicide or assisted suicide.

The most frequently stated interest of the state in proscribing suicide, attempted suicide or assisted suicide is the state's interest in preserving life. As Chief Justice Rehnquist stated in *Cruzan*, *supra*, 282,

> "... [W]e think a state may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."

So, clearly, the state has a recognizable interest in preserving life. It is equally clear, however, that this state interest is not absolute, and cannot insulate all state action from constitutional scrutiny. As explained by Chief Justice Rehnquist, this state interest must "be weighed against the constitutionally protected interests of the individual."

As a result, we see places in the law where this state interest must take a back seat to other protected rights.

In *Cruzan* the common law doctrine of informed consent, and a person's liberty right to refuse medical treatment, afforded constitutional protection to the individual notwithstanding the state's interest in preserving life.

This state interest in preserving life is certainly a sufficient justification for the state to proscribe attempted suicide under many, if not most, circumstances. The question remaining is whether this state interest is sufficient to proscribe attempted suicide under all circumstances. The obvious issue that arises at this point is the tension between this state interest in preserving life and the interest of a person whose quality of life is so poor that all reasonably objective observers would, at a minimum, sympathize with that person's desire to end their life.

Although some cases have suggested that the state interest in preserving life should be blind to the quality of life, a number of cases suggest that the state's interest in preserving life does have a qualitative component. *Cruzan*, again, is such a case. More to the point is *Buck* v *Bell*, 274 US 200; 47 S Ct 584; 71 LEd 1000 (1927). In that case, the United States Supreme Court upheld a state statute that required the sterilization of certain women. The Court found that the state in that case had a sufficient interest to avoid the creation of certain life because the state concluded the quality of such life was too low and too much of a burden on society to permit. As a result of this decision of the United States Supreme Court, one could fairly ask, if the state is allowed to prevent the creation of life because it deems the resulting quality too low, how can it deprive a person of the right, under certain circumstances, to come to that same conclusion with respect to their own life?

Consequently, the state interest in preserving life is important, but must be balanced against the constitutionally protected interests of the individual.

The state's interest in preserving life was given a more concrete defense in the area of suicide in a recent well-written article. Kamisar, *Are Laws Against Suicide Unconstitutional?*, 23 Hastings Center Report 32 (1993). Professor Kamisar argues that the state interest in preserving life allows the state to proscribe all attempted suicide, even attempted suicide that Professor Kamisar would find to be a rational act. He argues that the social sanctioning of rational suicide and assisted suicide will lead to an increase in irrational suicide. In support of this contention, Professor Kamisar writes,

> How likely is it that the social sanctioning of "rational" suicide and assisted suicide will lead to an increase in "irrational" suicide and assisted suicide? In a suicide-permissive society, how often will the "right" to commit suicide and the "right" to enlist the assistance of others in this enterprise be interpreted, especially by the most vulnerable, as the "duty" to do so? In a suicide-permissive society, how often will a burdensome, elderly relative not otherwise desirous of death be "helped along or pressured or manipulated" into suicide? *Id*, 40.

Certainly, if it is true that, by permitting rational suicide, the frequency of irrational suicides will increase, the state may possess a strong justification for proscribing all attempted suicides.

Professor Kamisar, however, offers no support for this causal connection. Couldn't one as effectively claim that by drawing a clear legal line between rational suicide and irrational suicide, the stigma of committing irra-

tional suicide would increase? Couldn't one as effectively argue that by establishing tight procedures to regulate the commission of rational suicide, a person who otherwise would have committed irrational suicide will embark on the procedures for lawful rational suicide, and, thereby, not only be prevented or dissuaded from committing irrational suicide, but receive professional treatment in the process?

The claim that drawing a line between acceptable and unacceptable conduct will increase the frequency of unacceptable conduct is far from clear. Most commentators now believe that the failure in the fifties and sixties to draw more meaningful lines between marijuana and harder illegal drugs contributed to the increased use of both. It is just as probable that the failure of the law to draw a meaningful line between rational and irrational suicide will increase the frequency of irrational suicide.

The resolution of this struggle between the state's proper interest in preventing irrational suicide, and the claimed liberty interest in allowing persons the right to commit rational suicide, comes down to the law's ability to draw a meaningful, enforceable, legal line that will make it clear where any given conduct falls. This appears to be the crux of the issue because it does not appear supportable to claim that the law by describing with care an area of rational suicide that is constitutionally protected, and the legislature proscribing all other irrational suicide, would lead to more irrational suicide than we presently have.

The fact that suicide can be a rational act is intuitive to some, but not obvious to all. A convincing discussion supporting the view that suicide can be a rational act is found in Brandt, *The Rationality of Suicide*, in, Battin & Mayo *supra*, 117. Professor Brandt sets the stage for his analysis:

"The problem, I take it, is a choice between future worldcourses: the world-course which includes my demise, say, an hour from now, and several possible ones which contain my demise at a later point. We cannot have precise knowledge about many features of the latter group of world-courses. One thing I can't have precise knowledge about is how or when I shall die if I do not commit suicide now. One thing is certain: it will be sometime, and it is almost certain that it will be before my one-hundredth birthday. So, to go on the rational probabilities, let us look up my life expectancy at my present age from the insurance tables, making any corrections that are called for in light of full medical information about my present state of health. If I do not already have a terminal illness, then the choice, say, is between a world-course with my death an hour from now, and several world-courses with my death, say, twenty years from now. The problem, I take it, is to decide whether the expectable utility to me of some possible world-course in which I go on for another twenty years is greater than or less than the expectable utility to me of the one in which my life stops in an hour. One thing to be clear about is: we are not choosing between death and immortality. We are choosing between death now and death some (possibly short) finite time from now.

. . .

We compare the suicide world-course with the continued life world-course (or several of them), and note the features with respect to which they differ." *Id*, 119.

Professor Brandt then sets focus on the rationality of a sick person deciding to commit suicide.

> "We always have to live by probabilities, and make our estimates as best we can. People sometimes argue that one should not commit suicide in order to escape the excruciating pain because a miraculous cure for one's terminal disease might be found tomorrow. And it is true that such a cure could, as a matter of logical possibility, be found tomorrow. But if everyone had argued in that way in the past hundred years, all of them would have waited until the bitter end and suffered excruciating pain; the line of argument that ignores probabilities and demands certainty would not have paid off in the past, and there is no reason to think it will pay off much better in the future." *Id*, 122.

Professor Brandt concludes this discussion by stating,

> "Let us not pursue the question whether it is rational for a person with a painful terminal illness to commit suicide; obviously it is." *Id*, 123.

Professor Brandt then goes on to assess whether suicide can be a rational act even for one who is not suffering from a painful terminal physical illness.

> "If we look over a list of the problems that bother people, and some of which various writers have regarded as good and sufficient reasons for ending life, one finds (in addition to serious illness) things like the following: some event which has made one feel ashamed or has cost one loss of prestige and status; reduction to poverty as compared with former affluence; the loss of a limb or physical beauty; the loss of sexual capacity; some event which makes it seem impos-

> sible that one will achieve things by which one sets store; loss of a loved one; disappointment in love; the infirmities of increasing age. It is not to be denied that such things can be serious blows to one's prospects of happiness." *Id.*

Professor Brandt then discusses the serious pitfalls that may be present when one ponders suicide based upon these reasons.

> "Most suicides which are irrational seem to be suicides of a moment of despair. What should be clear from the above is that a moment of despair should be, if one is seriously contemplating suicide, a moment of reassessment of one's goals and values, a reassessment which the individual must realize is very difficult to make objectively, because of the very quality of his depressed frame of mind." *Id*, 127.

With respect to suicide by a non-physically ill person Professor Brandt, finally, concludes with little conviction.

> "A decision to commit suicide may in certain circumstances be a rational one. But a person who wants to act rationally must take into account at least the various possible "errors" mentioned above and make appropriate rectifications in his initial evaluation." *Id*, 128-129.

By acknowledging the existence of "irrational" suicide, as that term is described in Professor Kamisar's and Professor Brandt's article, this Court also acknowledges, and concludes without great difficulty, that based upon the state's proper interests, there are circumstances where a person's decision to end their life, and the attempted execution of that decision, are not constitutionally protected, and could be proscribed by the state.

The two easiest examples are attempted suicide by a child or incompetent person who suffers from no objective debilitating physical illness. These types of suicides would probably be placed at one end of the continuum labeled irrational suicide. At the other end of the continuum, labeled rational suicide, would be the suicide of a competent adult who has an objectively verifiable terminal illness and who, as a result of that terminal illness, suffers from significant, substantial, and continuous agony, and objective medical analysis confirms that any alleviation of this discomfort is extremely unlikely prior to death.

Consequently, given the tenuous nature of the state's justifications for proscribing all forms of attempted suicide, this Court is convinced that if an adequate, meaningful line can be drawn between rational and irrational suicide, the liberty provision of the Due Process Clause protects a person's decision to commit rational suicide.

In pondering the continuum from irrational to rational suicide, it is difficult to draw a precise line. However, the societal debate seems to focus on several key issues: quality of life, competency, free choice, objective findings, permanency of condition. Based on these concepts, this Court concludes that a clear, meaningful and enforceable line can be drawn between rational and irrational suicide, in order to describe that area of attempted suicide that is constitutionally protected as being implicit in the concept of ordered liberty.

In drawing this line one of the most difficult issues is the one raised by the prosecutor at oral argument, to wit: If a person has a liberty interest in making an unfettered rational decision to commit suicide, when they have some objective medical condition that they believe makes life not worth living, how can you not extend that liberty interest to competent adults who have the

same attitude about their life, but do not have objective medical findings to support their desires? The prosecutor's argument continues, that if this personal decision is protected by the liberty provision, as a matter to which the state may not interfere, how can we deprive such competent adults of this right to make this decision?

The answer to this dilemma is found in the state's appropriate and compelling interest in preventing irrational suicide. If a line was drawn that did not require the presence of objective medical findings, the possibility that irrational suicide would increase is too great, since any form of rational suicide that did not include the presence of an objective medical condition would be too close to irrational suicide.

A state in implementing a compelling interest that restricts a fundamental right, must draw such a statute as narrowly as possible to express only the legitimate state interests at stake. *Roe, supra*, 410 US 155. This Court concludes that in drawing such a statute as narrowly as possible in order to adequately proscribe irrational suicide, a state may proscribe attempted suicide by competent adults where no objective medical condition is present.

Accordingly, this Court finds that when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable[2] response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue

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[2] The concept of "reasonable" is well known in our common law tradition. It is an objective legal concept. The state retains the right to establish an objective process to determine in this context what is reasonable and what is not.

influence, such a person has a constitutionally protected right to commit suicide.

The recognition of this right, however, does not remove the state's right to legislate in this area. A court decision recognizing a right of privacy or liberty must also acknowledge that some state regulation in areas protected by that right is appropriate.

> The willful termination of life requires controlled conditions, an appropriate environment, qualified persons, competent consultation and unequivocal informed consent.
>
> Bloom, *Letter to Editor*, The Detroit News, November 26, 1993.

State regulation in all these areas to insure that the bright line between "rational" and "irrational" suicide is maintained, is not only permissible, but desirable.

To return to section 7(1) in our case, however, the state has proscribed assistance to all suicides. Thus, the Court lastly addresses the question of whether the blanket proscription unduly burdens a person's right to commit rational suicide. The concept of whether a state regulation unduly burdens this exercise of a constitutional right has most recently been applied in the abortion cases. To paraphrase the explanation given in *Casey, supra*, 714-715, a finding of undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a person seeking to exercise a protected liberty interest, and is therefore invalid.

Thus, this Court must consider the impact upon a person's liberty interest in committing rational suicide, if the state is permitted to proscribe assistance for all forms of attempted suicide.

> It is reasonable to assume that many, if not most, physicians accept the fact that under specifically defined conditions the alternative to life serves the best interest of the patient, the surviving family and society.
>
> Dr. Bloom, *supra*.

Why do physicians accept that fact? The answer lies somewhere in contemporary attitudes about personal dignity and autonomy, the quality of life, happiness, and the meaning of life. If what Dr. Bloom stated is true with respect to most physicians, one cannot escape the conclusion that most physicians believe[3] that the proper parties to sort out these weighty issues are the patient, the patient's family, and the patient's doctor — not the state. The litany of the impact upon a person and their family if the state is permitted to proscribe "rational" suicide is, probably, both obvious and unnecessary. It is hard to imagine a state action that would have a greater intrusive effect upon a person's quest to make personal decisions based upon their personal moral beliefs, than the state's blanket proscription of assistance of rational suicide.

Accordingly, this Court finds that section 7(1) is unconstitutional as being overbroad with respect to a person's liberty interest in committing rational suicide. The question remains, however, whether this defendant has the requisite standing to ask this Court to strike down section 7(1) as being unconstitutional on the basis of overbreadth.

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3 According to *Quiet Voices Amid the Furor*, Detroit Free Press Magazine, November 14, 1993, p 6, many physicians act on this belief.

4.

WHETHER THIS DEFENDANT HAS STANDING TO CHALLENQE SECTION 7(1) ON OVERBREADTH IS NOT RIPE FOR DECISION

The doctrine of overbreadth is primarily applied to First Amendment situations where an overbroad statute prohibits constitutionally protected conduct. *People* v *McCumby*, 130 Mich App 710, 714 (1983), *lv den*, 419 Mich 911 (1984). In the absence of First Amendment rights, constitutional challenges based on overbreadth or vagueness must be examined in the light of the case's particular facts. *People* v *Green*, 123 Mich App 563, 565 (1983). In *Green*, *supra*, 565-566, the Court further explained:

> Furthermore, for defendant to have standing to challenge the statute on overbreadth the statute must be "overbroad in relation to defendant's conduct. One may not constitutionally challenge a statute on grounds of overbreadth against him when the statute clearly applies." *People* v *Burton*, 87 Mich App 598, 601; 274 NW2d 849 (1978). Defendant's hypotheticals for both constitutional attacks present some interesting problems. However, defendant's conduct clearly fits within the statute . . . . Whatever else the statute may or may not cover, it applies here. As such, defendant has no standing to argue either constitutional issue.

In the case at bar, defendant makēs no claim that any First Amendment rights are at issue. Consequently, in order for this defendant to have standing to challenge the unconstitutional overbreadth of this statute, he must show that the person he is alleged to have assisted committed rational suicide. The existing record in this case is inadequate to make this determination. Therefore, an evidentiary hearing must be held to

determine whether this defendant has standing. Because it is unclear at this time whether defendant has standing to challenge his prosecution under an application of section 7(1) deemed by this Court to be unconstitutional, a decision regarding whether the statute is unconstitutional is premature.

Accordingly, defendant's argument that section 7(1) violates the Due Process Clause does not warrant the granting of his motion to dismiss unless and until the record establishes the standing of this defendant.

5.

SECTION 7 DOES NOT DENY EQUAL PROTECTION

Defendant lastly argues that section 7 violates the equal protection clause of the Fourteenth Amendment.[4] He argues in his Brief, p 16, that section 7 violates equal protection since "different classes of persons are treated in different fashion without any rational basis thereof."

Posing the issue this way, however, leads to the conclusion that no violation of the equal protection clause has been shown. As explained in *Brody* v *Moan*, 551 F Supp 443, 448 (SD NY, 1982):

> "Constitutional principles of equal protection do not require that all persons be treated identically." . . . "The essence of equal protection is that persons similarly situated with respect to challenged government action shall be treated similarly." . . . The Supreme Court has explained that "The Constitution does not require things which are different in fact . . . to be treated in

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4 **US Const, Am XIV states in pertinent part:**

> **No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

> law as though they were the same." (Authorities omitted).

Defendant's argument, however, is posited on what he characterizes as different treatment for different classes. Framed as such he cannot show a denial of equal protection.

Moreover, the example given by defendant to show why the statute denies equal protection is based on an erroneous reading of the statute. Substantively, he argues that the statute denies equal protection because, whereas under *Cruzan* a comatose person would have the right to refuse medical treatment, and, in fact, to have food withheld from him or her, a conscious patient could not exercise this right if his or her purpose was to die. The latter situation is not violarive of section 7. Nothing in the statute requires a person to accept life saving measures, including feeding. Notably, subsection 2's excepting from the reach of subsection 1 the withholding or withdrawal of medical treatment does not turn on intent. Compare subsection 3. Thus, the decision by a conscious person to refuse medical treatment and a doctor's compliance with this request could not be punished under the statute.

Because the substantive basis of defendant's equal protection argument is fundamentally flawed, the conclusion he wishes the Court to make cannot be drawn.[5]

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[5] Defendant also argues that section 7 violates the Due Process Clause because it is arbitrary and capricious. These arguments, which also involve a substantive due process challenge to the statute, see *Sinola Lake Owners Assn* v *City of Simi Valley*, 882 F2d 1388, 1407 (CA 9, 1989), need only be resolved if it is ultimately found that this case does not involve "rational suicide" and, hence, implicates no liberty interest protected by the Due Process Clause. Finally, this Court rejects the prosecutor's argument that the Court of Appeals' stay of proceedings in another case in any way bears on this Court's ability to decide any issues that may come up in this case.

Accordingly, this Court finds that section 7 does not violate the equal protection clause of the Fourteenth Amendment.

ORDER

At a session of the Court held in the City-County Building, Detroit, Wayne County, Michigan, on this: DECEMBER 13, 1993.

PRESENT: HON. RICHARD C. KAUFMAN,
Circuit Judge.

The Court being fully informed in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that defendant's motion to dismiss is DENIED as to all his constitutional challenges except that based upon Due Process.

IT IS FURTHER ORDERED that as to the Due Process challenge, this matter is set for an evidentiary hearing on January 6, 1994, to determine whether this defendant has standing to attack the statute as overbroad.

/s/ RICHARD C. KAUFMAN
Circuit Judge

(*Certification Omitted*)

APPENDIX E

OPINION

(State of Michigan — Circuit Court — County of Oakland)

(Dated July 21, 1992)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -v- JACK KEVORKIAN, Defendant — CASE NO.: CR-92-115190-FC; HONORABLE DAVID F. BRECK)

SYLLABUS

(Not to be interpreted as part of this Court's Opinion)

The Defendant was indicted by a Grand Jury on three counts, two counts of Open Murder and one count of Delivery of a Controlled Substance. After a preliminary examination, the Defendant was bound over to this Court to stand trial on the Open Murder charges. The Defendant then moved this Court to dismiss the charges. At the same time, the Prosecutor appealed the examining court's decision to dismiss the controlled substance charge. This Court took both matters under advisement after oral argument. The following is a summary of the Opinion.

Count I on the Information charged the Defendant with Open Murder in the death of Marjorie Wantz. Mrs. Wantz had been suffering from horrible pain in her lower abdominal area. She had traveled with her husband to numerous specialists seeking relief. She underwent 9 or 10 surgeries and had contemplated having her spinal cord cut. After enduring the pain for as long as she could, Mrs. Wantz contacted the Defendant, who over two years discouraged her from suicide and referred her to Southeastern Michigan Hospice for pain relief. However, her pain was continuous, excruciating and could not be relieved by the treatment given at hospice.

Count II of the Information involved the death of Sherry Miller. In 1978 or 1979, Ms. Miller was diagnosed with multiple sclerosis. By 1989 she was confined to a wheelchair. 1991 found her confined to a bed or a wheelchair, without the use of her legs or her right arm,

only limited use of her left arm, and having problems talking and breathing. She decided to commit suicide and contacted the Defendant for his assistance. As with Mrs. Wantz, Defendant initially discouraged her from suicide and referred her to a psychiatrist.

The two women were brought to a secluded cabin by family members and/or close friends. The Defendant connected Mrs. Wantz to his "suicide-machine" and Ms. Miller to a canister of carbon monoxide. The latter device was activated by Ms. Miller and it is inferred that Mrs. Wantz activated the "suicide-machine", because the Prosecutor failed to prove Defendant activated it. After the woman died, Defendant notified the police.

The first issue addressed by the Court was whether physician assisted suicide is a crime in Michigan. *People* v *Roberts*, a 1920 Michigan Supreme Court decision, was similar in some respects to the instant case and that case held assisted suicide to be murder. However, that case has been criticized by numerous lower courts. Therefore, the Opinion (in Part A of Question I) discussed the issue, after concluding that *Roberts* no longer constitutes the law in Michigan, and ruled assisted suicide is not a crime, based on *People* v *Campbell*. Part B concluded that *Roberts* still represents the law in Michigan, but that Dr. Kevorkian's acts are distinguishable from the act of Frank Roberts due to the physician-patient relationship between the two women and the Defendant. The Court applied the right to die caselaw to physician assisted suicide after concluding that no valid distinction could be drawn between disconnecting life support equipment and connecting equipment designed to cause death when activated by the patient. The patient's right to control medical treatment and self-determination out-weighed any state interest involved. Thus, under Part B the Court ruled physician assisted suicide is not criminal. Under either analysis, the Court concluded that assisted suicide (whether physician assisted or layman assisted) is not a crime in Michigan.

In Question II, the Court concluded that the Defendant was not properly bound over on the Open Murder charges. Regarding Mrs. Wantz, in order to bind a defendant over for trial, the Prosecutor must establish the corpus delicti. The components of the corpus delicti are a dead body and evidence that the death was the result of the criminal act of another. Due to the Court's finding that physician assisted suicide is not a crime, the Prosecutor failed to establish the second component of the corpus delicti as to Mrs. Wantz.

Furthermore, the district court judge erroneously ruled that there was no testimony as to how Ms. Miller died. In fact, the testimony clearly showed Ms. Miller activated the carbon monoxide device, and therefore the most that was established was that Defendant assisted her. Once again, because physician assisted suicide is not a crime, the Defendant was wrongly bound over. Therefore, the Court granted Defendant's Motion to Quash as to both murder counts.

Question III addressed the Prosecutor's argument regarding the applicability of MCLA 750.505. The Court ruled this statute does not apply.

The Prosecutor's appeal of the dismissal of the controlled substance charge is discussed in Question IV. The Court concluded that a showing of "bad faith" is a necessary element of the charge as applied to physicians. The District Court found no bad faith and properly dismissed this charge.

Question V discussed the propriety of the Grand Jury and the Indictment. After reviewing the briefs submitted by the parties at the Court's request, the Court concluded that the Grand Jury properly heard the arguments and delivered a valid Indictment. Furthermore, any defects which may have existed were cured by the subsequent preliminary examination.

The Defendant raised numerous allegations of prosecutorial misconduct. These are discussed in Question VI. The Court concluded the allegations are unsubstantiated by any evidence.

Finally, the Court questioned the need for Legislative action, although noting several judges as well as the Oakland County Prosecutor have called for legislation. The Court suggested that the Michigan Medical Society, with input from the State Bar of Michigan, could address this issue. In the meantime, the Court requested Dr. Kevorkian to refrain from further counseling.

All charges against Dr. Kevorkian were dismissed. However, the Court invited appeal and requested the doctor to refrain from further counseling until the issue can be resolved. The Court also encouraged the medical profession to make more use of hospice treatment so that fewer people will consider suicide.

Respectfully submitted,

/s/ Judge David F. Breck
July 21, 1992

OPINION AND ORDER

(State of Michigan — Circuit Court — County of Oakland)

(Dated July 21, 1992)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -vs- JACK KEVORKIAN, Defendant — CASE NO: CR-92-115190-FC, 92-DA-5303-AR; HON. DAVID F. BRECK)

At a session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on the 21st day of July, 1992.

INTRODUCTION

The Defendant, Jack Kevorkian, M.D., was indicted by the Grand Jury on two counts of Open Murder (MCLA 750.316) relating to Marjorie Wantz and Sherry Miller, and one count of Delivery of a Controlled substance to Marjorie Wantz, to wit Methohexital (Brevital), a schedule IV controlled substance in violation of MCLA 7401(1), (2)(c); 333.7218(1). After a preliminary examination before Judge James Sheehy, the Defendant was bound over to stand trial on the open murder charges, and the Delivery of a Controlled Substance charge was dismissed. The Defendant has filed a motion to dismiss Counts I and II, and the Prosecutor has appealed the dismissal of Count III.

The preliminary examination testimony established that both Ms. Marjorie Wantz and Mrs. Sherry Miller were living lives of horrible desperation, both had contemplated suicide for a long period of time, and when they contacted Dr. Jack Kevorkian as a physician to give his aid in dying, he initially attempted to dissuade them from ending their lives.

William Wantz, Marjorie Wantz's husband, was called as a prosecution witness and testified that he traveled

to the Cleveland Clinic to seek advice about management of his wife's pain (115 to 116). Her medical records were furnished to Defendant (142). In 1990 she went into Sinai Hospital for surgery (143), but there was an effort (presumably by officials at Sinai) to commit her because she was suicidal (144). A doctor there did tell her suicide was one of her options (146). Eventually, a Kalamazoo state institution determined she was mentally competent (151). Her pain was in the vaginal area (164), and was not psychological (166). She even asked to have her spinal cord cut to stop the pain, but the physician at Cleveland Clinic advised there was no assurance that would eliminate the pain (167).

Besides the Cleveland Clinic, Mrs. Wantz contacted "numerous other places in the United States and nobody said they could do any good for her", including Mayo Clinic, University of Indiana, where the examiner said, "I've never seen anybody this bad" (206), Detroit doctors, and the University of Michigan (167). Her medication was four times stronger than morphine. (168)

In response to Mr. Fieger's questions, Mr. Wantz also testified that Mrs. Wantz took her own life after years of agonizing pain, and only after undergoing nine or ten surgeries on her vagina (170). Further, he testified that for years his wife would scream from the pain and needed sleeping pills at night (172).

Despite her desire to commit suicide due to her constant pain, Dr. Kevorkian tried to dissuade her from suicide (173). He referred her to Cleveland, and suggested acupuncture and hypnotism, Defendant also referred her to Dr. Finn at Southeastern Michigan Hospice for her pain, even though he knew that Dr. Finn did not subscribe to Defendant's position regarding physician assisted suicide. (174)

After medication failed, Dr. Finn's prognosis was "pain, pure and simple . . . that all the medicine he gave her wasn't taking care of it. His statement to me was it would be better off to be cancerous, at least in six months you might be dead" (meaning Mrs. Wantz) (175). She concluded finally that suicide was her only way out, because no one could cure her pain (176). It was so bad even wearing her panties hurt her. She could rarely leave home, and when she rode in a car she had to lay down in the back seat (177). Mrs. Wantz described the vaginal pain as "like sitting on a bonfire all the time" (178). Ultimately, after unsuccessfully trying to shoot herself (190), Mrs. Wantz wrote Exhibit L in which she said after three and one-half years, she could no longer go on with the pain and agony, only leaving the house to go to the doctor. She begged Dr. Kevorkian for two years. Her last thirteen months were spent living in "pure hell". She concluded, "No doctor can help me any more. If God won't come to me, I'm going to God. Can't stand it no longer". (187)

As for Sherry Miller's condition, Sharon Welsh testified for the prosecution that Ms. Miller was diagnosed with multiple sclerosis in 1978 or 1979 (p. 224). Around 1983 she was dragging one leg and then started using a cane (228), she "continually deteriorated", and went to a walker. Then her father carried her from place to place and in 1989, she went into a wheelchair, but she had to be put into it. (231) A couple of years before talking about Defendant, Ms. Miller said she wished she were dead (232). In the spring of 1990 she wrote a letter to Dr. Kevorkian and spoke to him on the telephone (233). Ms. Miller told Mrs. Welsh that she felt she was becoming a burden on people (235). By 1991 she was either confined to a bed or a wheelchair, did not have use of her legs and her right arm, only limited use of her left arm and had problems talking and breathing

(236), and said she probably would have to go into a nursing home, although she did not want to (237).

In response to Mr. Fieger's questions, Mrs. Welsh testified that Ms. Miller's father had to put her on the toilet, that her food had to be cut into small pieces and that she was getting rapidly worse (276). Due to the lack of joy in her life, she decided to commit suicide and contacted Dr. Kevorkian as a physician to assist her. For a number of years he encouraged her to seek treatment for multiple sclerosis and see a psychiatrist (278). When she made the decision to proceed, her siblings and parents supported her decision (288), as well as her psychiatrist (or psychologist) (293).

QUESTION NUMBER ONE: IS ASSISTED-SUICIDE A CRIME IN MICHIGAN?

A. "*CAMPBELL*" IS THE LAW

It is basic to our criminal law system that the public be advised of what behavior constitutes a crime. *People* v *Wiegand*, 369 Mich 204 (1963). As stated in *People* v *Llewellyn*, 401 Mich 314, 328 (1977):

> "It is a long-standing rule in this state that criminal statutes must establish with reasonable certainty the elements of the offense so that all persons subject to their penalties may know what acts it is their duty to avoid."

There being no statute relating to suicide, the Court must look to the common law.

The first known Michigan case to address this issue is *People* v *Roberts*, 211 Mich 187 (1920). In that case the defendant, at his wife's request, placed poison within reach of his wife who had expressed an intent to commit suicide because she had incurable multiple

sclerosis. She drank the poison and died. Defendant was charged with murder under C.L. 1915, Section 15192, which in pertinent parts is identical to MCLA 750,316, and he pled guilty. Two issues presented themselves: What degree of murder was he guilty of (the judge determined it to be first degree) and whether there was "evidence of the commission of the crime charged". The court very clearly ruled that Defendant was guilty of murder by poisoning, and in Section Two of the Opinion rejected the defense that assisted suicide was not a crime.

Sec. 2 of *Roberts* was entirely dictum in view of the fact that Mr. Roberts pled guilty to open murder. Having once done that, the only issue before the judge, pursuant to 3 Comp Laws 1915, Sec. 15194 (now cited as MCL 750.318), was to determine whether defendant was guilty of first or second degree murder. Under Michigan law, the only question to be resolved upon a plea to open murder is whether the accused's guilt is of the first or second degree. *Berry* v *Mintes*, (D.C. 1981) 529 FSupp 1067, affirmed 726 F2d 1142, certiorari denied 467 US 1245, 104 SCt 3520, 82 LEd 2d 828. Thus, as stated before, the second portion of the *Roberts* opinion was dictum. Furthermore, the *Roberts* opinion has been attributed very limited scope: "Proceedings to determine the degree of guilt.are not necessariiy to be regarded as a trial (*People* v *Marsh*, 14 Mich App 518, f.n. 1 at p. 522)

People v *Quicksall*, 322 Mich 351 (1948) is often cited as the second in the trilogy of Michigan assisted suicide cases. However, the defense of assisted suicide was never raised, the defendant actually shot the victim in a failed suicide pact, and the main issue was ineffective assistance of counsel. Therefore, *Quicksall* is not relevant to this case.

The only other appellate court case in Michigan is *People* v *Campbell*, 124 Mich App 333 (1983). At page 337 the court said:

> "We are not persuaded by Defendant's attempts to distinguish this case from *Roberts*, *supra*.
>
> We now consider whether the *Roberts* case still represents the law of Michigan and we find that it does not. Recent cases of our Supreme Court cast doubt on the vitality of the 1920 *Roberts* decision.[1]
>
> The *Roberts* case, without discussion, assumed that a murder had occurred and considered only the degree of that crime" (Page 337).

The *Campbell* court went on to define homicide:

> "Homicide is the killing of one human being by another . . . homicide is not a crime. In this state it is 'murder' and 'manslaughter' that are crimes . . . The term suicide excludes by definition a homicide." (Page 338)

The *Campbell* court concluded that defendant was not guilty of murder even though he incited the deceased to kill himself and provided the gun. That decision only makes sense, because common logic dictates that if suicide is not a crime (and it is not in Michigan), then someone who assists should not be criminally responsible. In this case, if the women triggered the devices (even though installed by Defendant), they would have committed suicide and a homicide would not have occurred.

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[1] This may be a veiled acknowledgment that the Court of Appeals cannot reverse the Supreme Court. If in fact the Supreme Court made decisions casting doubt on *Roberts*, then perhaps the *Campbell* court did not violate the rule of *People* v *Heard*, *infra*.

A question has been raised as to whether *Campbell* is an assisted suicide case or limited to an incitement to suicide case. The latter would be a grievous matter, and yet the court dismissed the case against Mr. Campbell. However, this Court is satisfied that the opinion is intended to cover assisted suicide as well. Not only is *Roberts* included in the opinion, but also the statutes referred to from other states all involve assisted suicides.

In *Campbell* the prosecutor sought leave to appeal to the Michigan Supreme Court and leave was denied. The prosecution cites *Clink* v *Steiner*, 162 Mich App 551, 413 NW2d 45 (1987), where the court held, pursuant to MCR 7.321, that a denial of an application for leave to appeal has no precedential value "in and of itself". However, each application for leave to appeal must satisfy the grounds set by MCR 7.302(B). In *Campbell* only subparagraph (5) could have been applicable:

> (B) *Grounds.* The application must show that
>
> "(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or .another decision of the Court of Appeals; or . . ."

Analysis of MCR 7.302 (B)(5), as applied to *Campbell*, reveals that the Supreme Court was satisfied that no clear error existed in the Court of Appeals ruling that would cause material injustice, nor did the decision materially conflict with a Supreme Court decision or any decision of the Court of Appeals. Thus, while the reasons for denial of leave to appeal may not be regarded as precedent, the denial itself reflects the appellant's failure to meet the grounds required by MCR

7.302(B), thereby making the Court of Appeals decision the binding adjudication.

While an honest comparison with *Campbell* and the instant case leads one to recognize that the facts in the latter are greatly disparate and the instant case much more akin to *Roberts*, nevertheless the *Campbell* court rightly stated, on page 339:

> "The common law is an emerging process. When a judge finds and applies the common law, hopefully he is applying the customs, usage and moral values of the present day."

How does one determine today's values, as they relate to assisted suicide? While certainly not exhaustive on this subject, the following indicators are helpful:

A. Recorders Court Judge Justin C. Ravitz demonstrated great prescience in *People* v *Slaughter* (No: 81-59442), where he dismissed a manslaughter charge against Mr. Slaughter who assisted his wife's suicide. Judge Ravitz, in 1982, found *Roberts* to be not controlling, and in doing so, said:

> "law is not static . . . the law is a breathing, living dynamic tool that's supposed to be consistent with serving the more noble objectives of human kind, and I dare say that our attitudes and our sensitivities to the tragic subject of this litigation have hopefully grown since 1920" (which is when *Roberts* was decided).

B. Three separate lower court judges have ruled that *Roberts* is not controlling. In *People* v *Adkins*, District Court Judge Gerald McNally ruled that *Roberts* is "flawed", indicating that the trial judge's hands were tied because Roberts pled guilty to murder. He then concluded that *Campbell* overruled *Roberts*. This Court

notes that the Prosecutor advances no valid reason for not appealing that decision.

In addition, District Court Judge James Sheehy ruled that *Roberts* is inapplicable to the instant case.

When the Wayne County Prosecutor prosecuted *People* v *Harper*, Recorder's Court No. 90-10081, the jury acquitted Mr. Harper even though he had actually tied the bag over his wife's head, which then caused her death by asphyxiation. Thus, a Michigan jury found Defendant not guilty, even in a case which appeared to involve active euthanasia. In that case, Recorders Court Judge Isidore B. Torres instructed the jury that if they found Defendant only assisted suicide, then he would be not guilty (See transcript attached).

To conclude this portion of the Opinion, *Campbell* held assisted suicide, whether physician assisted or not, is legal (and *Roberts* is not controlling). Obviously, legalized assisted suicide is plagued with problems, including: "unauthorized euthanasia by family members of incapacitated patients, or even judgment calls made by health professionals based on the cost-effectiveness of treatment for certain terminal patients. In addition, the potential civil liability for doctors who assist in an unsuccessful suicide attempt is considerable" {Wayne Law Review, Vol 37, p 1921, 1949 (1991)}. However, these same problems exist in right-to-die cases, and have been effectively addressed.

B.

"*CAMPBELL*" IS NOT THE LAW

It could also be argued that section two of the *Roberts* decision is not dictum. This argument is premised on the fact that a person cannot plead guilty to something which is not a crime. As stated in *People* v *Hammond*, 187 Mich App 105 (1991);

> "We hold that a plea of guilty of a nonexistent criminal offense is similar to the examples . . . in which the state never had a legitimate interest in securing a conviction. Accordingly, despite the plea bargain, the defendant may appeal and allege the illegality of his plea-based conviction of a nonexistent offense.
>
> For these reasons, we conclude that the lower court abused its discretion in failing to grant defendant's motion to withdraw his plea of guilty of conspiracy to commit second-degree murder" *People* v *Hammond*, at 113.

This principle was in effect in 1920 when the opinion in *Roberts* was rendered. *People* v *Utter*, 209 Mich 214 (1920).

While one limited exception did exist to this principle, when the guilty plea is the result of a plea bargain {see *People* v *Hooper*, 58 Mich App 132 (1975)}, the exception did not apply to *Roberts*. There is no indication that the plea in *Roberts* was the result of a plea bargain agreement.

The defendant in *Roberts* claimed that he had pled guilty to the non-existent crime of assisting a suicide. Such a claim survives a guilty plea due to the absence of a state interest in securing such a plea. *People* v *Hammond*, *supra*. Therefore, the Supreme Court's discussion in Section Two of whether a crime was committed was necessary to decide the case. If the Court had found assisting a suicide was not a crime, the conviction would have been set aside and the case dismissed. Section Two of the *Roberts* opinion is not dictum and the Supreme Court of Michigan determined that Mr. Roberts' act of assisting his wife's suicide constituted the crime of murder under the common law. The applic-

able statute fixed the degree of murder, which was accomplished by poison, as first degree murder.

The Defendant argues that *People* v *Campbell*, *supra*, effectively overruled *Roberts*. This is incorrect for two reasons. First, and most obvious, the Court of Appeals is not able to overrule a Supreme Court decision. *Hardy* v *Maxheimer*, 149 Mich App 236 (1986). Since *Roberts* was the opinion of the Supreme Court, the Court of Appeals was bound by the decision. Second, the *Roberts* opinion involved the interpretation of the common law offense of murder. Since Michigan does not statutorily define murder, the offense is defined pursuant to the common law. "The common law prevails except as abrogated by the Constitution, the Legislature, or the Supreme Court." *People* v *Heard*, 103 Mich App 571 (1981). Pursuant to *Heard*, the Court of Appeals lacked the power to abrogate the common law as announced in the *Roberts* opinion. Therefore, the *Campbell* decision had no effect on the Supreme Court's decision in *Roberts*.

The *Roberts* case is distinguishable from the instant case, however. In this case, the defendant is a doctor who was acting in the course of a physician-patient relationship (and this Court so holds, based upon the lower court testimony). This distinction does not compel a reversal of prior common law, because this Court has not been referred to any other physician assisted suicide cases, and our[2] research has failed to discover any. (There are no reported cases convicting a physician of aiding, abetting, or assisting a suicide", Wayne Law Review, supra, at 1932) In fact, when Dr. Timothy Quill

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[2] The Court takes this opportunity to credit his legal researcher, Mark S. Roberts, Esq. for his tireless devotion to this case. His insight, perseverance, and legal acumen greatly contributed to this Opinion.

wrote in the New England Journal of Medicine (324 New England Journal of Med, 691, 1991) that he assisted "Diane" commit suicide, he was never prosecuted and the New York State Health Department decided to not even charge him with professional misconduct. (Harvard Law Review, June, 1992, at p. 2024). Thus, in this respect, this is a criminal case of first impression at the Circuit Court level.

It is commonly accepted law that patients have the right to insist they be removed from life support systems, even though to do so will hasten their deaths. *Cruzan* v *Director, Missouri Department of Health*, 497 US ___, 110 S Ct 2841, 111 LEd 2d 224 (1990) and many cases cited therein. If a person can refuse life sustaining treatment, then that person should have the right to insist on treatment which will cause death, providing the physician is willing to assist and the patient is lucid and meets rational criteria. While the interests of the State are different when suicide is involved, it appears to this Court that nevertheless the prevailing interest should be the constitutionally protected interests of the individual.

The distinction between assisted suicide and the withdrawal of life support is a distinction without merit. But for the doctor's act of disconnecting the life support system, or the act of inserting the I.V. needle, death would not have occurred. "There is no morally important difference . . ." (Harvard Law Review, *supra*, footnote 69).[3] Dean Sheldon F. Kurtz, Dean and Foundation Pro-

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[3] **Readers are urged to read the entire essay in the foregoing Harvard Law Review, because the author addresses the role of the courts in assisted suicide cases, based on the following postulation:**

> **"Despite claims to the contrary, courts created exceptions to laws against 'aiding suicide' when they permitted patients to demand withdrawal of life-sustaining treatment. When life-sustaining care is withdrawn, patients are, in some sense, committing suicide and physicians are, in some sense, assisting them. Because this type of physician assisted sui-**

(*concluded on page A-219*)

fessor of Law, Florida State University College of Law, concurs:

> "Permitting the administration of a life-terminating drug, if intended by the patient, is morally indistinguishable from commonly accepted practices of withholding or withdrawing life-sustaining technologies, including food and hydration, from a terminally ill patient, an action that will also result in death."
>
> (American Medical News, Jan. 7, 1991, p. 13)

In *Cruzan, supra*, the court differed on whether Missouri could decree the standard of proof required to determine the patient's wishes (clear and convincing evidence, the majority ruled). While Justice Scalia, in dictum, seemed to admonish against assisted suicide, none of the Justices differed with the following views:

(1) "choices about death touch the core of liberty... not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to *individual conscience*" (emphasis added), at 4937, by Justice Stevens, in his dissenting opinion.

(2) Justices Brennan, Marshall and Blackmun, in their dissent, concurred that:

> "It is 'a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treat-

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(*continued from page A-218*)

cide has been legalized, there is no objective reason why courts cannot create exceptions in similar cases that involve lethal injections and prescription drugs" page 2030.

> ment — any treatment — is to be given at all . . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it'" *Tune* v *Walter Reed Army Medical Hospital*, 602 FSupp 1452, 1455 (DC 1985). See also *Downer* v *Veilleux*, 322 A2d 82 (Me 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others")." Page 4927.
>
> "Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence. 'In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.' *Brophy* v *New England Sinai Hospital, Inc.*, 398 Mass 417 434, 497 NE2d 626, 635-636 (1986)". Page 4929.

This Court notes that the analogy to right-to-die cases is not limited to terminal patients. In Washtenaw County, Michigan, {*In Re Blodgett* (83-26514-AZ)} a non-terminal quadriplegic, who was even able to operate a motorized wheel chair, was allowed to be removed from his portable ventilator because his quality of life was unbearable. That was also the result in *Bartling* v *Superior Court, et al.*, 209 Cal Rep 220, 1984.

On page four of Judge James Sheehy's Opinion he has an appropriate quote:

> "The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should . . . include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible . . . If there is ever a time when we ought to be able to get the government off our backs it is when we face death — either by choice or otherwise", Quoting Associate Justice Compton's concurring opinion in *Bouvia* v *Superior Court*, 179 Cal App 30. 1127, 225 Cal Rptr 297,307 and 308 (Cal App 2 Dist 1986), review denied (June 5, 1986).

Thus, it is this Court's conclusion that physician assisted suicide is not a crime in Michigan, even when the person's condition is not terminal.

QUESTION NUMBER TWO

DID THE MAGISTRATE ABUSE HIS DISCRETION BY BINDING DEFENDANT OVER ON TWO COUNTS OF OPEN MURDER?

The district court judge stated, "No testimony was presented as to who activated the two death devices" (page 7 of his Opinion). This statement is inaccurate as the transcript reveals that Sharon Welsh testified that Ms. Miller pulled the screw driver which caused the flow of carbon monoxide to commence (Page 279, lines 18 & 19 and page 267 lines 3-18). Therefore, as to Ms. Miller, the district court opinion is factually erroneous.

Thus, this Court finds the district court abused its discretion in binding the Defendant over on Count II (Open Murder) involving the death of Ms. Miller. The district court failed to consider the unrefuted testimony

presented which indicated Ms. Miller took her own life. Therefore, the only basis to bind the Defendant over on this count would be the Defendant's assisting in Ms. Miller's suicide, which this Court has determined is not a crime in the State of Michigan. The Defendant's Motion to Quash is granted as to Count II.

With regard to Mrs. Wantz, the district court's opinion is also incorrect. A review of the transcript reveals no direct testimony that Mrs. Wantz pulled the strings that activated the "machine". The testimony of Mr. Wantz indicates that only the Defendant, his sister and the two decedents were present when the machine was activated. (page 152, lines 19-23, also p. 160 lines 13-23). When asked if the Defendant activated the machine, Mr. Wantz replied, "To my knowledge, no." (Page 185, lines 12-14)

However, Mr. Wantz further testified that Mrs. Wantz was trying to pull the string when he left the room (page 194 lines 15 & 16). After he left, he heard Defendant say, "Marj, you have to hold your hand up" (Page 194, lines 17-21). It may be concluded from this testimony that Mrs. Wantz was having difficulty activating the machine. Two inferences may be drawn from that testimony. First, Mrs. Wantz was eventually able to activate the machine, ending her life. Second, and equally plausible, Mrs. Wantz was incapable of activating the machine, so it was activated for her by someone who was in the room, ending her life. The issue then becomes whether this last inference is sufficient to support the bind-over.

In *People* v *Meyer*, 46 Mich App 357 (1973), a similar issue was presented. In that case, the defendant was charged with manslaughter. The cause of death was "pulmonary edema and was caused by probable drug intoxication". The defendant had made statements to

the police that while she held the victim's arm, a co-defendant injected the victim with heroin. (This was done at the victim's request due to her inability to hit a vein.) The case was bound over.

The defendant's Motion to Quash the Information was denied. Defendant appealed the denial of her motion, arguing that there was insufficient evidence at the preliminary examination, absent her confession, to establish the corpus delicti. The court then stated the components of the corpus delicti in a homicide case are a dead body and evidence that the death was the result of the criminal act or agency of another. *Meyer* at 363.

The court ruled:

> "The proffered medical evidence established (1) the absence of barbiturates, (2) the presence of quinine, which indicated the presence of morphine, (3) the existence of needle marks, one of recent origin, (4) anatomic changes associated with the patient diagnosed as pulmonary edema, and (5) the absence of a preexisting disease or natural illness. This combination of factors, including circumstantial evidence, was sufficient to establish the unnatural character of the death but creates no reliable evidence of another person's criminality. *Without more, these facts are as consistent with a theory of accident or self-injection by the deceased as a theory of criminality.*" (emphasis added) *Meyer* at 363-364.

The court then began to discuss whether the defendant's statements could be used to establish the corpus delicti. However, the above quoted passage indicates that where two equally plausible inferences may be drawn from the evidence presented, one establishing the corpus delicti, one negating it, then additional evidence is required to support a bind-over decision.

In the instant case, as stated before, there exist two equally plausible inferences which may be drawn from Mr. Wantz's testimony. One which would establish Mrs. Wantz injected herself and one establishing the criminal act of Defendant or his sister injecting her. This being the case, additional evidence was required in order to support the bind-over. There is no direct testimony in the record to establish that Mrs. Wantz died due to a criminal act.

This Court has not overlooked the fact that Dr. Dragovic lists the manner of death as "homicide" (323) on the death certificate. This Court rejects the medical examiner's definition of homicide, which equates assisted suicide and homicide *(Campbell, supra,* 338). The act of a physician assisting a suicide is not a criminal act. Therefore, the manner of death listed on the death certificate does not establish the second element of the corpus delicti.

Thus, this Court finds the district court abused its discretion in binding the Defendant over on Count I (Open Murder) involving the death of Mrs. Wantz.

The Motion to Quash is granted, and Counts I and II are hereby dismissed.

QUESTION NUMBER THREE

THE APPLICABILITY OF MCLA 750.505
PUNISHMENT FOR INDICTABLE COMMON LAW OFFENSES

The Prosecutor contends that if this Court determines that assisting a suicide is not murder, then the Defendant may still be prosecuted for the common law crime of assisting a suicide, even though neither the Grand Jury Indictment nor the Information contain this charge. MCLA 750.505, according to the Prosecutor, would apply as it provides punishment for common law offenses for which no punishment is expressly provided. It states:

750.505. Punishment for indictable common law offenses

Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $ 10,000.00, or both in the discretion of the court."

Historically, assisting a suicide fell within the common law definition of murder. *Michigan's "Uncommon Law" of Homicide*, 7 Cooley Law Review (1990). In Michigan, MCLA 750.316 and .317 provide the punishment for murder using the common law definition of murder. Therefore, any act defined as murder under the common law is properly prosecuted under MCLA 750.316 and .317. As the statutes have expressly provided punishment for those crimes defined as murder by the common law, MCLA 750.505 does not apply. Also, it does not apply because physician assisted suicide was not a crime at common law.

QUESTION NUMBER FOUR

PROSECUTOR'S APPEAL FROM DISMISSAL OF COUNT III (DELIVERY OF A CONTROLLED SUBSTANCE)

The Prosecutor has appealed the district court's decision not to bind the Defendant over to Circuit Court for trial on Count III, Delivery of a Controlled Substance, in violation of MCLA 333.7401. That statute states, in pertinent part:

"*333.7401. Unlawful manufacture, delivery, or possession with intent to manufacture or deliver; unlawful dispensing, prescription or administration; penalties*

> Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, *deliver, or possess with intent* to manufacture or *deliver, a controlled substance*, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not *dispense*, prescribe, or *administer* a controlled substance for other than *legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner*, licensee, or applicant." (Emphasis added)

Our Court of Appeals set forth the standard to be used in determining whether a physician's actions were in the course of his professional practice or research. It stated:

> "The standard required in determining whether the physician's actions were in the course of professional practice or research is whether the doctor made an "honest" or "good faith" effort to treat and prescribe in compliance with an accepted standard of medical practice." *People* v *Downes*, 168 Mich App 484, 488 (1987)

The Court then cited the following footnote from *People* v *Alford*, 405 Mich 570 (1979):

> "In *Moore* the United States Supreme Court noted that: The jury was instructed that Dr. Moore could not be convicted if he merely made 'an honest effort' to prescribe for detoxification in compliance with an accepted standard of medical practice. *People* v *Downes*, *supra*, at 488.

The *Alford* court also ruled, "An 'honest effort' or good faith compliance is the standard required in deter-

mining whether the physician's actions were in the course of professional practice or research." *Alford*, at 589.

In the instant case the district court, in refusing to bind Dr. Kevorkian over on the delivery charge, stated:

> "The People have failed to establish the elements of Count III, Delivery of Controlled Substance. Dr. Kevorkian did not prescribe drugs in this case; he used drugs. The use of drugs was the instrumentality of the death process. The doctor did not act in bad faith nor did he traffic in drugs. (Trafficking in drugs is defined as the passing of goods or commodities from one person to another for an equivalent in goods or money.) Count III is therefore dismissed." (Judge Sheehy Opinion at page 8)

This Court finds that there was sufficient testimony in the lower court establishing a physician-patient relationship with both women.

There was testimony at Dr. Kevorkian's preliminary examination by Dr. DeKornfeld that the manner in which Defendant used Brevital was not an accepted medical practice. However, more importantly, he also testified that there are "physicians who support physician assisted suicide as a legitimate medical practice" (496). Further, there was no proof that the Defendant acted in bad faith, and that is what Judge Sheehy ruled. Thus, there was an element of the crime missing, because according to *People* v *Alford*, *supra*; *US* v *Moore*, 423 US 122, 96 SCt 335, 46 LEd 2d at 333, 348 and *People* v *Downes*, *supra*, "the standard required in determining whether the physician's actions were in the course of professional practice or research . . ." is whether Defendant acted in good faith or made an honest effort to comply *(Downes*, *supra*, at 488).

In *Downes*, there was testimony that the defendant did not comply with good medical practice. In fact the *Downes* court found "the record in this case establishes departures from accepted standards of medical practice . . ." and noted the physician witness did not speculate as to the defendant's motives. Therefore, the court found that there was a missing element in the preliminary exam; namely, the good or bad faith of the defendant and the case was dismissed:

> "The evidence at the preliminary examination established that Defendant's actions were not good medical practice. There was no proof, however, that Defendant acted in bad faith." (page 488)

Certainly from Mrs. Wantz's viewpoint, Defendant was acting in good faith by responding to her request for this use of Brevital to end her life.

As there was testimony that physician assisted suicide is a legitimate medical practice, Judge Sheehy correctly required proof of bad faith. There being none shown on the record, Judge Sheehy did not abuse his discretion in dismissing Count III.

Thus, the Prosecutor's appeal is denied.

QUESTION NUMBER FIVE
GRAND JURY ISSUES

The parties, at the Court's request, briefed the issue of whether the Grand Jury which indicted Defendant was properly empowered to hear the case. The petition to seat the Grand Jury stated that it is necessary to investigate "unsolved homicides, attempted homicides, and additional narcotics investigations". The order empaneling the Grand Jury ordered it to "investigate unsolved murders, the illegal possession, distribution, manufac-

turing, and/or delivery of controlled substances, and conspiracies or attempts to commit these offenses". Since the instant case does not constitute an unsolved murder, it is argued the Grand Jury, as limited by the order creating it, was powerless to indict the Defendant.

The issue of Grand Jury irregularity was addressed in *People* v *Reigel*, 120 Mich 78 (1899). In that case the defendant argued that the judge failed to follow the procedures for empaneling the jury. Due to this defect, the defendant moved to quash the indictment. That motion was denied.

In its opinion affirming the denial of the motion, the Supreme Court stated:

> "A grand jury assembled under color of law is a de facto grand jury, and an indictment found by such jury cannot be attacked upon the ground that it was not found by a lawfully constituted jury, but that the proceedings of such a jury are valid, the same as are those of a court presided over by a de facto judge." *Reigel*, at 86.

Pursuant to *Reigel*, the fact that the instant grand Jury may have acted outside the order by which it was created will not invalidate the indictment.

In addition, the Court notes that the Defendant also had the benefit of a second probable cause hearing, the preliminary examination. Any technical defects in the indictment were cured by the examination. The Court finds that any irregularity regarding the Grand Jury proceedings does not mandate a dismissal of the case.

QUESTION NUMBER SIX
PROSECUTORIAL MISCONDUCT

The Defendant argues that he is entitled to a dismissal of all charges due to the misconduct of the Oak-

land County Prosecutor's Office. It is first argued that the Defendant's rights were violated by the improper conduct of the Prosecutor before the grand Jury. It is stated that the Defendant was called before the grand jury knowing that he would invoke his fifth amendment right and decline to answer. The Prosecutor, knowing this, continued to question the Defendant for one half hour.

As noted in the Court's discussion in Question Five, any impropriety in the grand jury proceedings was cured by the preliminary examination. Additionally, the "impropriety" the Defendant referred to is not so serious as to require a dismissal of the charges. The Defendant was adequately represented by counsel and did in fact assert his right to refuse to answer the questions. Any prejudicial affect was remedied by the subsequent preliminary examination.

The Defendant next argues that the press conference in which a summary of the grand jury testimony was revealed was improper. This conference was held after the Defendant was arrested, however. The matter was sealed until the Defendant's arrest. Once again, any impropriety in the grand jury procedure was remedied by the preliminary examination.

The final points raised by Defendant require little discussion. The Supreme Court has already addressed the alleged investigation of Judge Sheehy, who presided over the preliminary examination. Given the Supreme Court's response and the fact that no supporting evidence was presented, this Court finds no merit to Defendant's argument on this issue. There are other avenues of recourse available to Defendant.

Finally, regarding the alleged assault upon the Defendant's attorney and witnesses, this Court again notes the

total lack of any substantiating evidence. Therefore, the dismissal of the case against Defendant is not required by the Defendant's allegations of prosecutorial misconduct.

QUESTION NUMBER SEVEN
IS THERE A NEED FOR LEGISLATION?

Almost ten years ago the *Campbell* court urged the Legislature to take action, and noted "no Legislature has classified such conduct as murder" (p. 340). Oakland County Prosecutor Richard Thompson, as well as other Michigan prosecutors, have encouraged legislative action. Judge Gerald McNally in his *Atkin's* Opinion, as well as Judge James Sheehy in his Opinion, recognized the need for legislation. Even now our Legislature is struggling with the issue of whether to make assisted suicide a crime and the Michigan Medical Society is wisely urging the appointment of a commission to address the issue, prompted by the concerns of many physicians questioning the wisdom of making assisted suicide a crime.

This Court is uncertain whether legislation is the answer. Perhaps it is best to leave the solution to the Michigan Medical Society and the State Bar of Michigan.

CONCLUSION

While this Court has found that the physician assisted suicide in this case is not a crime in Michigan, the prevalence of suicide can be kept to a minimum if doctors can be educated about, and the public be made aware of, the benefits of hospice. Many times a patient's pain can be relieved and the dedicated volunteers, nurses, physicians and staffs can help the patient die in comfort and assist the family in their grief, thereby obviating the desire to commit suicide.

It must be recognized, though, that there are some people with intractable pain that cannot benefit from hospice treatment ("The Physician's Responsibility Toward Hopelessly Ill Patients", *The New England Journal of Medicine*, March 30, 1989, p. 844 at 847). For those patients, whether terminal or not, who have unmanageable pain, physician assisted suicide remains an alternative.

The following quotation seems especially appropriate at this point:

> "Kevorkian's and Quill's desire for open debate, as well as that of the eight doctors who supported the role of physicians in assisting in rational suicide, is laudable. That collective social decisions are possible is evident in the Netherlands, where guidelines allow euthanasia under carefully regulated conditions. But if nothing more than legislated safeguards result from the debate in this country, we shall have failed in the goal of better meeting a patient's needs at death. For the discussion to proceed to the development of thoughtful and sensitive public policy, both the medical profession and legislators must be better able to distinguish between people whose suicidal intent is clearly conceived and free of distorting mental disturbances and people who are in need of psychiatric care. As the debate proceeds, we must avoid romanticizing suicide, regarding it simplistically, or allowing negative attitudes toward aging to influence its course. Furthermore, the public controversy over euthanasia, suicide, and the right to die should not be confused with the equally important debate about allocating limited health resources to terminally ill patients. Additional research and education of the medical

> profession and the public about the nature of affective disorders and suicide late in life will lead to a more informed discussion and possibly to lower suicide rates resulting from the earlier recognition and treatment of people at risk." *(Rational Suicide And The Right To Die*, New England Journal of Medicine, October 10, 1991 at page 1102)

This Court's opinion relies upon case law, but also includes mention of bio-ethics, philosophy and references to medical texts and proposed legislation. These are not normally found in a legal opinion. However, because the parties have argued such matters in their briefs, and because this is a case of first impression, the Court responded.[4]

We must not lose sight of the two most important and sorrowful people who had such a crucial role in this case: Sherry Miller, whose life had no quality and who was so totally dependent upon others, and Marjorie Wantz, who suffered her excruciating pain probably longer than any of us would have endured. It is these sad women, whether terminal or not, for whom we must have compassion.

These final comments are addressed to Dr. Jack Kevorkian: you have brought to the world's attention the need to give this topic paramount concern. This

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4 The Court has found the following sources helpful: *Michigan's Proposed Assisted Suicide Legislation: Strong Public Policy or Legislative Rhetoric?*, 69 U DET MERCY L REV 33 (1991); Molenda, *Active Euthanasia: Can It Be Justified?*, 24 TULSA L J 165 (1988); Kutner, *The Living Will Coping With The Historical Event of Death*, 27 BAYLOR L REV 39 (1975); Weir, *The Morality of Physician Assisted Suicide*, 20 LAW MED AND HEALTH CARE NO 1-2 (SPRING-SUMMER 1992); *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG J OF MED 844-849 (MARCH 30, 1989); *The Right of the Terminally Ill to Die, With Assistance if Necessary*, 8 CRIM JUST J 403 (1986).

Judge, however, respectfully requests that you forego any other activities in this field, including counseling, for the time being. To continue I fear hurts your cause, because you may force the Legislature to take hasty, and perhaps improvident, action. Give the Michigan Medical Society and the Michigan Bar Association more time to do right.

This case is dismissed. However, as this Opinion has limited precedential value, appeal is invited.

/s/ DAVID F. BRECK
CIRCUIT JUDGE

DATED: JULY 21, 1992

EXCERPTS OF COURT'S CHARGE TO THE JURY

(State of Michigan — Recorder's Court — City of Detroit)

(Proceedings of May 9, 1991)

(THE PEOPLE OF THE STATE OF MICHIGAN, Complainant, v BERTRAM ROBERT HARPER, Defendant — No. 90-10081)

Before the Honorable ISIDORE B. TORRES, Recorder's Court Judge, Detroit, Michigan, on Thursday, May 9, 1991.

APPEARANCES: TIMOTHY KENNY, Assistant Prosecuting Attorney, Appearing on behalf of the People; HUGH DAVIS, ESQ., and OTIS W. CULPEPPER, ESQ., Appearing on behalf of the Defendant.

* * *

(3) Detroit, Michigan
Thursday, May 9, 1991 — Afternoon Session

THE COURT: Ladies and gentlemen of the jury, I will now read to you the instruction on second degree murder.

The Defendant is charged with second degree murder. To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant caused the death of the decedent, Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation.

Second, that the Defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Mrs. Harper, or he intentionally — I'm sorry — or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was a likely result of his actions.

Ladies and gentlemen of the jury, I have just instructed you on the elements of second degree murder which must be found beyond a reasonable doubt for a conviction on this offense.

For this crime, I have instructed that one element (4) that you must find proven beyond a reasonable doubt is that the Defendant caused the death of Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation by Defendant's fastening a bag over her head.

I will now read you the instructions on suicide and euthanasia.

I instruct you that a suicide is a death caused by one's own hands or actions. It is the intentional destruction of a person by himself or herself.

Put another way, it is to cause one's own death.

Suicide excludes by definition that the death of a deceased was caused by the sole and final acts of another person.

I instruct you that suicide is not a crime in the State of Michigan. In this case, the Defendant is charged with murder in the second degree. If you find that the Defendant, Robert Harper, only intended and only acted to

the level of preparing and assisting a suicide, then he is not guilty of murder.

It is for you to determine the Defendant's intent and actions at the time of the acts charged in the Information.

I instruct you also that an act of euthanasia is the act of putting to death a person suffering from incurable or distressing disease, an act of mercy, commonly (5) known as a mercy killing.

The prosecution is required to prove beyond a reasonable doubt that the Defendant caused the death of Mrs. Harper. But if you so find, then, whether his motives were good or ill, is not for your consideration.

I instruct you that an act of euthanasia is a homicide subject to the instructions on second degree murder that I have just given you.

You have heard testimony that Mr. Harper and/or Mrs. Harper believed that assisted suicide was legal in the State of Michigan.

If you believe that the evidence establishes beyond a reasonable doubt that Mr. Harper committed murder in the second degree, the Defendant cannot claim ignorance of the law or mistake of law as a defense.

A mistake about the state of the law regarding one's rights to take life will not excuse a homicide.

* * *

THE COURT: Ladies and gentlemen of the jury, I have received the following note from you. It states as follows:

> "We request a copy of the elements of second degree murder."

Ladies and gentlemen, I have the only copy. They have not been typed up for you. But what I will do is (6) simply to read it to you. Okay? This is now the instruction on second degree murder.

The Defendant is charged with the crime of second degree murder.

To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant caused the death of Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation.

Second, that the Defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Mrs. Harper, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions.

That is the instructions on second degree murder.

* * *

(Certificate of Reporter Omitted)